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No. 06-11543

SUPREME COURT, U.S.
FILED
NOV 5 - 2007
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IN THE

# Supreme Court of the United States

LARRY BEGAY,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## JOINT APPENDIX

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November 5, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

**PETITION FOR CERTIORARI FILED MAY 22, 2007**
**CERTIORARI GRANTED SEPTEMBER 25, 2007**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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04-CR-00245 WJ

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

LARRY BEGAY,
*Defendant.*

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**RELEVANT DOCKET ENTRIES**

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | * * * * |
| 11/09/2004 | 9 | **INDICTMENT** by USA David M. Walsh. Counts filed against Larry Begay (1) count(s) 1 (mk) (Entered: 11/12/2004) |
| | | * * * * |
| 01/24/2005 | 22 | **PLEA AGREEMENT** as Larry Begay (jrm) (Entered: 01/24/2005) |
| 01/24/2005 | 23 | **CLERK'S MINUTES**: before Magistrate Judge Robert H. Scott. Larry Begay enters guilty plea to indictment; sentencing to be set; deft in custody C/R; Danna Everett; Interpreter; Esther Yazzie* (dmw) (Entered: 01/25/05) |
| | | * * * * |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 04/13/2005 | 26 | **AMENDED OBJECTIONS** by plaintiff to presentence report/sentencing memorandum* (dmw) (Entered: 04/13/2005) |
| 05/09/2005 | 27 | **SENTENCING MEMORANDUM** by Larry Begay* (dmw) (Entered: (05/10/2005) |
| 05/16/2005 | 28 | **CLERK'S MINUTES**: before District Judge William P. Johnson sentencing continued as to Larry Begay C/R: T Garrett (dmw) (Entered: 05/17/2005) |
| 07/01/2005 | 29 | **MEMORANDUM OPINION AND ORDER** by District Judge William P. Johnson on the issue of whether deft should be sentenced as an armed career criminal, as further described herein (cc: all counsel*) SENT TO WESTLAW & LEXIS FOR PUBLICATION ON 7/19/05 (dmw) Modified on 7/01/2005 (Entered: 07/01/2005) |
| | | * * * * |
| 07/15/2005 | 31 | **MOTION FOR RECONSIDERATION OF MEMORANDUM OPINION & ORDER** re career criminal by Larry Begay* (dmw) (Entered: 07/15/2005) |
| 07/18/2005 | 32 | **RESPONSE TO MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER** re career by plaintiff [31 - 1]* (dmw) (Entered: 07/19/2005) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
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| 07/20/2005 | 34 | **CLERK'S MINUTES**: before District Judge William P. Johnson sentencing Larry Begay (1) count(s) 1. SENTENCE IMPOSED: CBOP: 188 Months; 3 years supervised release w/special conditions; SPA $ 100.00; deft in custody, case terminated C/R: T Garrett (dmw) (Entered: 07/22/2005) |
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| 08/05/2005 | 36 | **NOTICE OF APPEAL** to Circuit Court by Larry Begay [35 - 1]; Fees not required - Distribution as required. (pg) (Entered: 08/05/2005) |

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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05-2253

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

LARRY BEGAY,
*Defendant.*

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**RELEVANT DOCKET ENTRIES**

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 12/27/2005 | [1883018] | **APPELLANT'S BRIEF** filed by Larry Begay. Original and 7 copies. c/s: y. Served on 12/21/05. Oral Argument? y. Appellee's brief due 1/23/06 for United States. |
| | | * * * * |
| 01/26/2006 | [1886514] | **APPELLEE'S ANSWER BRIEF** filed by United States filed per court order of 2/6/06. original and 7 copies. c/s: y. Served on 1/24/06. Oral Argument? y. Appellant's optional reply brief due 2/10/06 for Larry Begay. |
| | | * * * * |
| 02/13/2006 | [1888681] | **APPELLANT'S REPLY BRIEF** filed by Larry Begay. Original and copies. c/s: y. |
| | | * * * * |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 07/27/2006 | [1940588] | **CASE ARGUED** by Margaret A. Katze for appellant and by David N. Williams for appellee; Submitted to Judges Lucero, Hartz, McConnell. |
| 12/12/2006 | [1983928] | **TERMINATED ON THE MERITS** after Oral Hearing; Affirmed; Written, Signed, Published. Lucero, concurring; Hartz, authoring judge; McConnell. [05-2253] Parties served by mail on 12/12/06. |
| | | * * * * |
| 01/09/2007 | [1990445] | **PETITION FOR REHEARING EN BANC** [05-2253] filed by Larry Begay. Original and 18 copies. c/s: y. |
| | | * * * * |
| 02/07/2007 | [1999295] | **RESPONSE TO APPELLANT'S PETITION FOR REHEARING EN BANC** filed by United States; submitted to court. original and 14 copies. c/s: y. |
| 02/21/2007 | [2003439] | **ORDER DENYING PETITION FOR REHEARING** [1990445 - 1] filed by Judges Lucero, Hartz and McConnell. Judge McConnell dissents from denial. No one called for a poll; therefore, the en banc petition is also denied. |

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed NOV 9, 2004]

---

Criminal No. 04-2245 WJ

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UNITED STATES OF AMERICA,
*Plaintiff*,

vs.

LARRY BEGAY,
*Defendant*.

---

18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2):

Felon in Possession of a Firearm

*INDICTMENT*

The Grand Jury charges:

On or about the 25th day of September, 2004, in McKinley County, State and District of New Mexico, the defendant, LARRY BEGAY, a person who had been convicted of crimes punishable by imprisonment for a term exceeding one year, Driving While Under the Influence of Intoxicating Liquor and/or Drugs, a fourth degree felony, in the Eleventh Judicial District Court in Cause No. CR-2001-275, Aggravated Driving While Under the Influence of Intoxicating Liquor and/or Drugs, a fourth degree felony, in the Seventh Judicial District Court in Cause No. 0725-CR-2000-00139, Driving While Under the Influence of Intoxicating Liquor and/or Drugs in the Eleventh Judicial District Court, a fourth degree felony, in Cause No. CR-98-000079, did unlawfully and knowingly possess

a firearm, namely, a Martin model Glenfield .75C, .22 caliber rifle, serial number 23381287.

In violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2).

**SENTENCING ALLEGATIONS**

1. In relation to the Defendant's possession of the firearm as charged in the Indictment, the Defendant possessed a firearm in connection with committing the felony offenses of Assault with a dangerous weapon, within the meaning of U.S.S.G. § 2K2.1(b)(5).

2. In relation to the Defendant's prior felony convictions as charged in the Indictment, the Defendant possessed a firearm after sustaining a felony conviction for a crime of violence within the meaning of U.S.S.G. § 2K2.1(a)(4)(A) and a violent felony within the meaning of 18 U.S.C. § 924(e)(2)(B).

/s/ [Illegible]

/s/ Paula Burnett
United States Attorney

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUN 24, 2005]

---

Criminal No. 04-2245 WJ

---

UNITED STATES OF AMERICA,
*Plaintiff*,

vs.

LARRY BEGAY,
*Defendant*.

---

**PLEA AGREEMENT**

Pursuant to Rule 11, Fed. R. Crim. P., the parties hereby notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the defendant, **LARRY BEGAY**, and the defendant's counsel, Margaret Katze, Esq.

**REPRESENTATION BY COUNSEL**

1. The defendant understands his right to be represented by an attorney and is so represented. The defendant has thoroughly reviewed all aspects of this ease wit] his attorney and is fully satisfied with that attorney's legal representation.

**RIGHTS OF THE DEFENDANT**

2. The defendant further understands his rights:

   a. to plead not guilty;

   b. to have a trial by jury;

   c. to confront and cross-examine witnesses and to call witnesses in his defense; and

d. against compelled self-incrimination.

**WAIVER OF RIGHTS AND PLEA OF GUILTY**

3. The defendant hereby agrees to waive these rights and to plead guilty to the one count indictment charging a violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) that being Felon in Possession of a Firearm.

**SENTENCING**

4. The defendant understands that the maximum penalty the Court can impose is:

a. imprisonment for a period of not more than ten (10) years; however, the defendant may be an armed career criminal which carries a minimum mandatory sentence of fifteen (15) years imprisonment.

b. a fine not to exceed the greater of $250,000,

c. a term of supervised release of not less than two (2) years nor more than three (3) years that must follow any term of imprisonment. (If the defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the defendant's supervised release could be revoked—even on the last day of the term—and the defendant could then be returned to another period of incarceration and a new term of supervised release.); and

d. a mandatory special penalty assessment of $100.00.

5. Sentencing is pursuant to the advisory United States Sentencing Guidelines and the applicable statutes. The defendant has reviewed the application

of the guidelines with Margaret Katze, his attorney, but understands that no one can predict with certainty what guideline range will be applicable in this case or what the sentence will be with respect to the applicable statutory maximum or statutory minimum, until after a presentence investigation has been completed and the Court has ruled on the results of that investigation. The defendant will riot be allowed to withdraw his guilty plea if the sentence is higher than the defendant expected. **The defendant fully understands that no one can predict with certainty what sentence the Court will impose. The determination of the actual sentence imposed is solely in the reasonable discretion of the Court.**

6. It is expressly understood and agreed by and between the defendant and the United States that:

a. The United States has made, and will make, NO AGREEMENT pursuant to Rule 11 (e)(1)(C), Fed. R. Grim. P., that a specific sentence is the appropriate disposition of this case.

b. The United States has made, and will make, NO AGREEMENT to approve, to oppose, or not to oppose pursuant to Rule 11(e)(1)(8), Fed. R Crim. P. any request made by the defendant or on behalf of the defendant for a particular sentence in this case.

c. The United States hereby expressly reserves the right to make known to the United States Probation Office, for inclusion in the presentence report prepared pursuant to Rule 32(c)(2), Fed, R. Crim. P., any information that the United States believes may be helpful to the Court.

## STIPULATIONS

7. The United States and the defendant stipulate as follows:

Pursuant to U.S.S.G § 3E1.1, the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, Consequently, the defendants ultimate sentence should reflect a full acceptance of responsibility. This recommendation is contingent upon the defendant providing an appropriate oral or written statement to the United States Probation officer who prepares the presentence report in this case in which the defendant clearly establishes his entitlement to this reduction.

8. The United States and the defendant understand that the above stipulation is not binding on the Court and that whether the Court accepts this stipulation is e matter solely within the discretion of the Court after it has reviewed the presentence report.

## FORFEITURE

9. The defendant agrees that he will forfeit to the United States all of his right, title, and interest in the following assets and properties:

a. a Marlin, model Glenfield .75C, .22 caliber rifle, serial number 23381287;

## GOVERNMENT'S AGREEMENT

10. Provided that the defendant fulfills his obligations as set out above, the United States agrees that:

a. The United States will not bring additional charges against the defendant arising out of the

defendant's conduct now known to the United States Attorney's Office for the District of New Mexico.

b. At sentencing, the United States will recommend the bottom end of the advisory guideline imprisonment range.

11. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

## VOLUNTARY PLEA

12. The defendant agrees and represents that this plea of guilty is freely and voluntarily made and not the result of force or threats or of promises apart from those set forth in this plea agreement There have been no representations or promises from anyone as to what sentence the Court will impose.

## VIOLATION OF PLEA AGREEMENT

13. The defendant understands and agrees that if he violates any provision of this plea agreement, the United States may declare this plea agreement null and void, and the defendant will thereafter be subject to prosecution for any criminal violation including, but not limited to, any crime(s) or offense(s) contained in or related to the indictment filed in this case, as well as perjury, false statement, and obstruction of justice.

## ENTIRETY OF AGREEMENT

14. This document is a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties.

AGREED TO AND SIGNED this 24th day of January, 2005.

/s/
David M. Walsh
Assistant United States Attorney
201 Third Street N.W., Suite 900
Post Office Box 607
Albuquerque, New Mexico 87102
(505) 346-7274

I have read this agreement and carefully reviewed every part of it with my attorney. I understand the agreement and voluntarily sign it.

/s/
LARRY BEGAY
Defendant

/s/
MARGARET KATZE
Attorney for Defendant

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed APR 13, 2005]

---

Criminal No. 04-2245 WJ

---

UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

LARRY BEGAY,
*Defendant.*

---

**AMENDED UNITED STATES' OBJECTIONS TO PRESENTENCE REPORT/SENTENCING MEMORANDUM**

---

COMES NOW Plaintiff, the United States of America, by and through its attorneys, David C. Iglesias, United States Attorney, and David M. Walsh, Assistant United States Attorney for said district, and does hereby submit its objections to the Presentence Report as follows:

## FACTUAL BACKGROUND

On November 9, 2004, an indictment was filed charging the defendant with Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). The charge arose out of an incident that occurred on or about September 25, 2004. On that date, the defendant, after a night of drinking Jim Beam whiskey and Bull Ice beer, pointed a .22 rifle at his family members, Annie and Helen Begay.

First, the defendant demanded money from Helen and threatened to shoot her and repeatedly pressed the trigger of the empty firearm. Next, the defendant went inside Annie's room and pointed the rifle at her and demanded that she give him money. Presentence Report, ¶¶ 10-11.

Annie Begay called the authorities the next day. Eventually, a firearm was retrieved from the defendant's bedroom, and the defendant was interviewed about the incident. In a post-Miranda statement, the defendant admitted to Special Agent Oscar Ramirez of the FBI that he owned a .22 caliber rifle and knew that he was not to be in possession of a firearm. The defendant, however, was reticent about his threatening conduct towards Annie and Helen Begay. An investigation into the defendant's criminal history revealed that the defendant had three (3) felony DUI convictions prior to September 25, 2004.

## I. OBJECTIONS TO PRESENTENCE REPORT

### A. *The Defendant should be Sentenced as an Armed Career Criminal Under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.*

The United States objects to the total offense level as stated in the Presentence Report and contends that the. Defendant is an armed career criminal due to his three (3) felony DUI convictions. The defendant therefore must be sentenced to a statutory minimum of fifteen (15) years imprisonment. Several definitions of "crime of violence" appear in the Sentencing Guidelines and related statutes, and those definitions apply in different situations. For example, in the recent immigration-related case of *Leocal v. Ashcroft*, --U.S--, 125 S.Ct. 377 (2004), the U.S. Supreme Court held that a DUI offense did not meet the definition of

crime of violence under 18 U.S.C. § 16. This case does not affect the instant one given that a different statutory definition was at issue in *Leocal*[1]. In fact, the *Leocal* opinion takes note of the distinction between 18 U.S.C. § 16 and the broader career-offender definition in the sentencing guidelines. Whereas the definition under 18 U.S.C. § 16 relates to the use of force, the Court recognized that the career-offender definition includes "conduct that presents a serious potential risk of physical injury to another." *Leocal v. Ashcroft*, --U.S.—, 125 S.Ct. at 388, fn. 7. Although the career offender "crime of violence" definition of § 4B1.2 of the guidelines differs somewhat from the Armed Career Criminal definition under 924(e), both definitions include the "otherwise" clause: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a)(2).[2]

The U.S. Supreme Court has not addressed whether a felony DUI conviction is a predicate offense under 924(e) or § 4B1.2. However, other courts have addressed the issue, rendering different results. The

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[1] *See United States v. McGill*, 347 F. Supp. 1210, 1214 (M.D. Alabama 2004), discussed *infra*, noting that the *Leocal* Court distinguished the guideline definition of § 4B1.2 from that of 18 U.S.C. § 16.

[2] In the § 2K2.1 guideline section for firearms cases, if a defendant has a prior conviction for a crime of violence, the base offense level is 20 if there's one such conviction and 24 if there are at least two such convictions. The definition for a crime of violence for the purposes of § 2K2.1 is governed by the definition under § 4B1.2. Here, if the Defendant has a crime of violence under § 2K2.1/§ 4B1.2, then the Defendant will also be an aimed career criminal since his DUI offenses would fall under "conduct that presents a serious potential risk of physical injury to another."

Eight Circuit has ruled that a DUI offense is not a violent crime under the career offender provision, nor under 924(e). *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005); *United States v. McCall*, 397 F.3d 1028 (8th Cir. 2005). On the other hand, the Fifth Circuit has determined that DUI does count under § 4B1.2. *United States v. DeSantiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000).[3] Additionally, in the case of *McGill*, 347 F. Supp. at 1210 (M.D. Alabama 2004), an Alabama district court has recently ruled that a DUI offense could constitute a crime of violence under § 4B1.2 of the guidelines.

Likewise, in *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995), the Seventh Circuit found that a DUI offense causing bodily injury was a crime of violence under § 4B1.2. The *Rutherford* holding is directly on point for other "plain" DUI offenses that do not involve injury, because the *Rutherford* court found that the DUI offense was not a crime of violence based on the use of force, but rather because it met the definition of the "otherwise" clause under § 4B1.2. In making its ruling, the Seventh Circuit noted that it was misguided, under the "otherwise" clause, to focus on the actual effect of the conduct. In other words, to determine "serious potential risk of physical injury," the court reasoned that it was of no import whether someone actually was injured or not, since injury can occur from conduct that presents a minimal risk. *Rutherford*, 54 F.3d at 376. Instead, the *Rutherford* court observed that the focus must be placed on the conduct involved in the offense.

---

[3] *DeSantiago-Gonzales* was an immigration case, but the § 4B1.2 definition of "crime of violence" was applied. The court determined that the misdemeanor DUI offenses were crimes of violence because of the serious potential risk of physical injury.

*Rutherford*, 54 F.3d at 375-376 ("Driving Under the Influence vastly increases the probability that the driver will injure someone in an accident.").[4] *See also McGill*, 347 F. Supp. at 1215 ("the cases make clear that it is the *nature* of the act of drunk driving itself, rather than any potential *result* that renders felony DUI a "crime of violence" under the Sentencing Guidelines.")(emphasis in original).[5]

The Tenth Circuit has not directly stated that felony DUI is a crime of violence within the meaning of § 4B1.2 or 924(e), but it has suggested as much. In *United States v. Farnsworth*, 92 F.3d 1001, 1008-09 (10th Cir. 1996), the Tenth Circuit held that the crime of grossly negligent driving under the influence of drugs or alcohol is a crime of violence under § 4B 1.2, finding that the conduct presented a serious potential risk of physical injury. *Farnsworth*, 92 F.3d at 1008-09. In so holding, the Tenth Circuit stated that:

> [w]e agree with the Seventh Circuit that: the dangers of drunk driving are well documented.

---

[4] That Felony DUI poses a serious potential risk of injury is an obvious proposition to many New Mexicans.

[5] To compare DUI with other offenses that have been construed as violent crimes under the "otherwise" clause of the Armed Career Criminal Act, *see e.g.*, *United States v. Martin*, 378 F.3d 578 (6th Cir. 2004) (eluding a police officer presented serious potential risk of injury); *United States v. Howtze*, 343 F.3d 919 (7th Cir. 2003) (flights to avoid arrest and street thefts were crimes of violence under the ACCA); *United States v. James*, 337 F.3d 387 (4th Cir. 2003) (failing to stop for a "blue light" was a violent felony under 924(e)); *United v. Sacko*, 103 F. Supp.2d 85, 90 (D.R.I. 2000)(third degree sexual assault was a "violent felony," with the court noting that a serious potential risk exists if the likelihood of injury is more than trifling or insignificant).

> Unlike other acts that may present some risk of physical injury, . . . the risk of injury from drunk driving is neither conjectural nor speculative. . . . Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known. This is sufficient to satisfy the "serious risk" standard of the "otherwise" clause [of § 4B1.2(1)(ii)].

*Farnsworth*, 92 F.3d at 1009 (brackets in original) (citing *Rutherford*).

Based on the reasoning in *Rutherford* and *Farnsworth* and a fair reading of the statute, the United States contends that felony DUI is a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii) since the conduct of a felony DUI "involves conduct that presents a serious potential risk of physical injury to another." Felony DUI offenses squarely fit within the "otherwise" clause of both § 4B1.2 and 924(e). Arguably, any one-time act of driving drunk presents a serious risk of physical injury to another. But, it is the repeated act of driving drunk, as in the case of someone who has been convicted of felony DUI, that certainly fits the bill of presenting a serious potential risk of physical injury to another.

B. *The Defendant's Conduct with the Firearm Warrants an Enhancement*

An armed career criminal's base offense level under § 4B1.4 of the guidelines is either a 33 or 34. In this case, the base offense level should be a 34, since the Defendant committed an aggravated assault with a deadly weapon when he pointed his .22 rifle at Annie and Helen Begay. Accordingly, the Defendant's guideline range should be 188-235 months. In the event the Court does not sentence the Defendant as

an armed career criminal, a 4-level enhancement. under § 2K2.1(b)(5) should apply for the Defendant's possession of a firearm in connection with another felony offense.

Respectfully submitted,

DAVID C. IGLESIAS
United States Attorney

*Electronically filed on 4/13/05*
DAVID M. WALSH
Assistant United States Attorney
P.O. Box 607
Albuquerque, NM 87103
(505) 346-7274

[Certificate of Service omitted in printing]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed MAY 9, 2005]

---

Criminal No. 04-22245 WJ

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UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

LARRY BEGAY,
*Defendant.*

---

**DEFENDANT'S SENTENCING MEMORANDUM**

Larry Begay, by and through his attorney, Margaret Katze, Assistant Federal Public Defender files the following sentencing memorandum.

1. The government asserts that Mr. Begay has 3 felony DUI convictions and should therefore be sentenced as an Armed Career Criminal to 15 years in prison. They reach this conclusion based on the faulty believe that a DUI is a "crime of violence". A DUI conviction is not a crime of violence and does not qualify as a predicate felony for purposes of 18 U.S.C. §924(e).

2. 18 U.S.C. §924(e)(2)(B) defines a "crime of violence" as any crime punishable by imprisonment for a term exceeding one year that has as an element the use, attempted use or threatened use of physical force against the person of another; or is burglary, arson or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential

risk of physical injury to another. The government has not proven that Mr. Begay has three convictions for any such offense nor that the crimes were punishable by imprisonment of more than one year. A reading of New Mexico Statutes Annotated §66-8-102 shows that the statutory definition of driving while under the influence does not include an element of force nor does it show that the crime itself is statutorily punishable by a term of imprisonment exceeding one year.

3. There is no Tenth Circuit law that has establishes DUI as a crime of violence for purposes of determining Armed Career Criminal status. Courts that have ruled on this issue, in this context and others, have found that a DUI is not a crime of violence. In *U.S. v. Brian Hartley*, (04-350MV, U.S. District Court, District of New Mexico), Judge Warren W. Eginton refused to find that a DWI was a crime of violence in a similar situation where the government was urging the court to enhance the defendant's sentence by finding that a DWI conviction was a conviction for a crime of violence. (Court found that DWI conviction was not a crime of violence for purposes of determining offense level pursuant to U.S.S.G. §2K2.1(a).)

4. The government dismisses *United States v. McCall*, 397 F.3d 1028 (8th Cir. 2005) in a string cite, when in fact it is the case most on point. In that case decided recently, the court concluded that a felony DWI is not a violent felony under the Armed Career Criminal Act (ACCA). The McCall court followed *U.S. v. Walker*, 393 F.3d 819 (8th Cir. 2005) which also decided that a felony DWI was not a violent felony under the (ACCA). Further the opinion refers to the, then, Chief Judge Breyer's opinion in *U.S. v. Doe*,

"There is no reason to believe that Congress meant to enhance sentences based on, say, proof of drunken driving convictions. Rather, we must read the definition in light of the term to be defined, 'violent felony', which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *U.S. v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (cited with approval in *Leocal v. Ashcroft* 125 S.Ct. 377, 383 (2004)).

5. The court in *Walker* discusses statutory construction and legislative history relative to this inquiry. "The otherwise clause of §4B1.2(2) follows an enumeration of specific crimes: burglary of a dwelling, arson, extortion, and crimes that involve the use of explosives. Where general words follow specific words in a statutory enumeration, the established interpretive canons of *noscitur a sociis* and *ejusdem generis* provide that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. This conclusion is reinforced by the legislative history of the statute from which the guideline is derived. DWI is not similar to the crimes listed in §4B1.2(a)(2), therefore under the rule of *ejusdem generis*, DWI is not encompassed by the general language the follows." *U.S. v. McCall*, 397 F.3d 1028, 1031 (8th Cir. 2005) (internal citations omitted).

6. The Supreme Court recently ruled in *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004), that DUI is not a crime of violence. The court found that state DUI offenses, (like the New Mexico statute), that do not require proof of any particular mental state, or that require only a showing of negligence in driving a car do not constitute crimes of violence under 18 U.S.C. §16. Subsection(a) of §16, which defines a crime of

violence as an offense that has as an element the use. . .of physical force against the person or property of another, suggests a higher degree of intent than negligence or merely accidental conduct. Subsection (b) of § 16 which further defines a crime of violence as any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, relates to the risk that physical force may be required to commit the crime, e.g., burglary. "The ordinary meaning of this term, [crime of violence], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI." *Id.* at 383. The elements of 18 U.S.C. §924(e) and 18 U.S.C. §16 are very similar and upon analysis of the two sections the same conclusion is reached—DUI is not a crime of violence.

7. The cases the government cite in support of it's proposition are inapposite. In *U.S. v. Farnsworth*, 92 F.3d 1001 (10th Cir. 1996) the prior conviction in question was a vehicular manslaughter. There the defendant was convicted of killing a human being. Likewise, in *U.S. v. Rutherford*, 54 F.3d 370 (7th Cir. 1995), the prior conviction in question was assault. There the defendant caused serious bodily injury to another person.

* * * *

Wherefore, for the foregoing reasons this Court should find that any prior DUI conviction is not a crime of violence and that Mr. Begay should not be sentenced as an Armed Career Criminal.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
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(505) 346-2489

Electronically filed
Margaret A. Katze
Attorney for Defendant

[Certificate of Service omitted in printing]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed MAY 16, 2005]

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Criminal No 04-2245 WJ

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UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

LARRY BEGAY,
*Defendant.*

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TRANSCRIPT OF SENTENCING

* * * *

[5] MR. WALSH: Your Honor, if I may approach, I would like to tender to the Court Government Exhibits 1, 2, and 3, which are the defendant's felony convictions:

THE COURT: Any objection?

MS. KATZE: No, Your Honor.

THE COURT: All right. They will be admitted. (Government's Exhibits 1, 2, and 3 admitted into evidence.)

MR. WALSH: Your Honor, Government's Exhibits 1, 2, and 3 are three felony DUI convictions of the defendant, and [6] again, we are relying upon those convictions to support our argument that the defendant is an armed career criminal under 18 U.S.C. 924(e). Just to touch upon the arguments laid out in the government's Sentencing Memorandum, it's the

Supreme Court; United States Supreme Court has not addressed the issue as to whether felony DUI counts for the purposes of 924(e) as far as it being a predicate offense.

THE COURT: What about the—you mentioned the *Leocal* case.

MR. WALSH: Yes, Your Honor.

THE COURT: Now, what exactly were the facts in *Leocal*? What did the Supreme Court address?

MR. WALSH: Your Honor, the key issue with respect to *Leocal*, as it applies here, is that, one, that I argue that it does not apply because the Supreme Court was interpreting a completely different statute and a statute whose definition, in terms of crime of violence, reads differently than the statute of 18 U.S.C. 924(e)

As a matter of fact, Footnote 7 of that particular case recognizes that—or that points out in the case that the court noted that they were not dealing with the 18 U.S.C. 924(e) statute and that the statute that was being reviewed under *Leocal* did not have the particular clause which we say applies here. That has come to be known as the quote-unquote otherwise clause.

[7] And I read from that the otherwise clause indicates under U.S.C. 924(e), which also, Your Honor, is the same definition under Section 4B1.2 of the sentencing guidelines, that applies to the career offender provision. The otherwise clause states, "or otherwise involves conduct that presents a serious potential risk of physical injury to another."

So again, I refer the Court to Footnote 7 in *Leocal*, which kind of clarifies that the court was not ad-

dressing 924(e) and was dealing with a different statute in terms of what was a crime of violence or what wasn't. And I think Footnote 7 indicates that the Supreme Court was pointing out that it was not making a call or a decision as to whether a felony DUI counts for purposes of 924(e) or 4B1.2 of the sentencing guidelines.

So I think that *Leocal* actually perhaps suggests that the Supreme Court is open-minded about the felony DUI being a crime of violence under the armed career criminal statute because of this otherwise clause that wasn't present in the statute that was being reviewed in *Leocal*.

As to the other cases that have addressed this issue, the Eighth Circuit has said no, and I point this out to the Court in—let's see. The Eighth Circuit, in *United States versus Walker* and *United States versus McCall*, has stated that—has ruled that felony DUI does not count. They have determined that it does not count for the purposes of 924(e).

[8] And as to the authority that has deemed a felony DUI as being a predicate offense under 924(e), I would refer to Court to *United States versus DeSantiago-Gonzales* and also the case of *United States versus McGill*, which is a district court case out of Alabama, a 2004 case.

And *DeSantiago-Gonzales*, it was a little convoluted because they were dealing with an immigration case, but they weren't dealing with the immigration statute that was reviewed under *Leocal*. They were being guided by 4B1.2, that definition under the career offender provision which contains that otherwise clause. And the United States—the Alabama case of *McGill* was dealing with 4Bl.2 of the guidelines, which again, is the same definition as 924(e).

The Tenth Circuit has not specifically addressed whether a felony DUI does not count for purposes of 924(e); however, it has suggested that it could count or perhaps that it should count. And in my brief, Your Honor, I referred to the case of *United States versus Farnsworth.*

Now, they were dealing with a different offense. They weren't dealing with strictly felony DUI. They were dealing with a grossly negligent driving offense that I believe resulted in injury. But what's important with respect to *Farnsworth* is that they interpreted 924(e) or they felt like the appropriate analysis was to look at the nature of the conduct at issue as opposed to the actual result.

[9] And they cite a case which I cite to in my brief, to *United States versus Rutherford,* a Seventh Circuit case. And in that case, they found that DUI, an offense causing bodily injury, was a crime of violence under Section 4B1.2. And in order for the *Rutherford* case to get where they eventually arrived; they go through an analysis where they really pinpoint the conduct and they say that the cases make clear that it is the nature of the act of drunk driving itself rather than any potential result that renders felony DUI a crime of violence under the sentencing guidelines.

THE COURT: The *Rutherford* case, though, from what jurisdiction did that emanate from?

MR. WALSH: The Seventh, Your Honor.

THE COURT: Was it a Seventh—

MR. WALSH: A Seventh Circuit case.

THE COURT: Is it a distinction between the Eighth Circuit opinion where they said it does not—

the felony DWI does not, and then the Seventh—is the difference in that there was DWI, but in one instance, you had serious bodily injury, and the other you didn't?

MR. WALSH: I believe that the Eighth Circuit, they went about their analysis differently than the analysis that was conducted in *Rutherford*. I think to my memory, the Eighth Circuit in that case, they did not look at that otherwise clause and they did not look at the nature of the offense to [10] determine whether it involved a potential serious injury or risk to another.

They, I believer reached their conclusion by essentially saying, well, DUI is not what you think of when you think of a violent offense. And I think that their—they got it wrong because they got away from interpreting the statute itself under 18 U.S.C. 924(e); again, that being the otherwise Clause.

And again, *Rutherford* goes on to say that driving under the influence vastly increases the probability that the driver will injure someone in an accident, and again, the main focus of the *Rutherford* case was the conduct and not the overall result or the outcome. And again, the Tenth Circuit, in *United States versus Farnsworth*, followed the analysis that was laid out in *Rutherford*.

The Tenth Circuit said that, "We agree with the Seventh Circuit that the dangers of drunk driving are well documented unlike other acts that may present risk of physical injury. The risk of injury for drunk driving is neither conjectural nor speculative. Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known. This is sufficient to satisfy the, quote, serious

risk standard of the, quote, otherwise clause of 4B1.2."

And again; the Tenth Circuit case of *Farnsworth* was [11] dealing with an offense that was—that resulted in injury grossly negligent driving under the influence of drugs or alcohol and not really felony DUI; however, what's important, I contend, is that the analysis that they undertook was that laid out in *Rutherford*, which focused on the nature of the conduct as opposed to the actual outcome.

So that, that's kind of the authority that's out there in a nutshell, Your Honor. We think that felony DUI counts for the purposes of 924(e) because it fits within the plain meaning of the statute. I think that's some—a proposition that New Mexican state residents would not have any problem with, that felony DUI has a serious potential risk of injury to another.

For those reasons, we contend that the defendant is an armed career criminal under 924(e) and, therefore, has to face 15 years of mandatory confinement.

THE COURT: Ms. Katze, in her memorandum, referenced, I guess, a decision that visiting Judge Warren Eginton made on this same issue, and he, I guess, would I be correct he followed the Eighth Circuit's analysis? Are you familiar with that?

MR. WALSH: I—

THE COURT: I know it was published. It may have been an oral pronouncement from the bench. I'm not sure.

MR. WALSH: Yes, Your Honor, I don't know if the [12] Judge Eginton, whether Judge Eginton followed the Eighth Circuit or whatever, but that is certainly my understanding, that he determined that felony

DUI was not a crime of violence under 924(e). That case was going to get appealed, and for a while, it was—the appeal was in the works. But I think for *Booker*-related reasons, it's my understanding that that appeal was dropped. So there was no such issue that's before the Tenth Circuit at the moment.

THE COURT: Okay.

MR. WALSH: Nothing further, Your Honor.

* * * *

[13] MS. KATZE: Your Honor, I believe that the government's reasoning set forth in their brief and their argument is basically overruled by *Leocal*. Even though the statute that they predominantly address is different, the government can only point to a footnote to urge the Court that *Leocal* doesn't apply.

And I would ask the Court to consider the following paragraph that I think is exactly on point and addresses the reasoning that we need to deal with here, the underlying question: Is DWI a crime of violence? And this is just shortly after Footnote 7, and it says, "In construing both parts of Section 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with Section 16's [14] emphasis on the use of physical force against another person or the risk of having to use such force in committing a crime, Suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."

They go on and cite with approval the opinion of the then Chief Judge Breyer: "Observing that the term 'violent felony' in U.S.C. 924(e)"—which is what we're dealing with—"calls to mind a tradition of

crimes that involve the possibility of more closely related, active violence. Interpreting Section 16 to encompass accidental or negligent conduct would blur the distinction between the violent crimes Congress sought to distinguish for heightened punishment and other crimes."

And I think their analysis is exactly on point, and I believe that is the controlling law, the Supreme Court case and the analysis that we have. The cases that the government cited all occurred pre-*Leocal*, and the only case that they discuss that occurred post-*Leocal* was the Eighth Circuit case of *McCall* that followed the reasoning and then applied it specifically and only to the 924(e) situation. I think that's exactly what's on point for what we are arguing here.

And just as an—I think that resolves the issue, but as a side issue, but I don't believe that the government, if we're going to look at this from a categorical approach, the government hasn't proven that the statute of conviction, the [15] New Mexico statute making DWI a crime, that it has as a specific element the use of force the potential use of force the substantial risk of injury or any other definition that's included in 924(e).

They have not shown that, if we take the categorical approach under *Taylor* and subsequently under *Shepard*, that it meets that, nor have they proven also that, under the definition of what is a crime of violence, a crime which has as a sentence one year or more in prison. They haven't come forward and proven that.

And I think that those—I add those issues for the record, but I believe that it is—the issue itself is resolved by *Leocal* and certainly by *McCall*. And I

think Probation's analysis of the situation—and it appears to be the same as ours, looking at *McCall* and the language that they cite. And I think this is important as far as how do we evaluate or analyze the statute.

And there is—in *McCall*, they discuss some legislative history and statutory construction as well in *Leocal*. In *Leocal*, they look, at the Florida statute for DWI, which doesn't appear to be any different in that—again, they reach the conclusion. "Section 16 cannot be read to include a conviction for DUI causing serious bodily injury under Florida law. This construction is reenforce by Congress' use of the term 'crime of violence.'"

[16] And they go on and discuss the Immigration and Naturalization Act. But I would also point the Court to the language in the Eighth Circuit decision, *McCall*; again, the only case that we're discussing that has analyzed the situation post-*Leocal*, with the indication from the Supreme Court how they. analyze this situation: "There is no reason to believe that Congress meant to enhance a sentence based on, say, proof of drunk driving. Rather, we must read the definition in light of the term to be defined—'violent felony'—which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence."

The court also stated that the clause in 4B1.2 follows an enumeration of specific crimes, and again, these are crimes, again, that we think of in the tradition of act of violence: Burglary of a dwelling, arson, use of explosives.

And then, "Where general words follow specific words in a statutory enumeration the established

interpretive canons noscitur a sociis and ejusdem generis"—and I apologize if my Latin wasn't correct.

THE COURT: I don't think it's any better than mine.

MS. KATZE: "Provide that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"; and, "DWI is simply not similar to the crimes listed."

It's not encompassed in the general language, and it [17] doesn't fall—and Mr. Walsh discussed the otherwise clause. That's exactly what their analysis addresses, that it doesn't fall within the otherwise clause. By its nature, it's a different type of crime.

Your Honor, that's with respect to the issue of whether or not Mr. Begay is—should be considered an armed career criminal and receive a 180-month sentence versus Probation's analysis and evaluation of the—under the sentencing guideline's that he should receive 41 months. The issue of whether or not a DWI should be considered a crime of violence for that purpose, that's my argument on that.

THE COURT: Mr. Walsh, since it was the government's objection, do you wish to make anything—say anything in reply to defense counsel's argument?

MR. WALSH: Real briefly, Your Honor. Just again, just to go back to our argument, we're arguing that felony DUI fits under the otherwise clause of 924(e) and that, again, the otherwise clause is not part and was not part of the statute that the *Leocal* case dealt with. And again, that particular footnote makes that distinction, saying that—

THE COURT: Let me ask you this. Ms. Katze made one point that the New Mexico statute under which, I guess, Exhibits 1, 2, and 3 are based on, which would be the New Mexico felony statute.

MR. WALSH: Yes, Your Honor, 66-8-102.

[18] THE COURT: Right. She makes a point that none of the elements in that New Mexico statute would constitute a crime of violence; so therefore, as I understand the argument, if the statutes that you're relying—if the offenses under state law that you're relying on to trigger the 924(e) enhancement the underlying state law offenses would not constitute crimes of violence, then how could, you know, nine—

MR. WALSH: Well. I think that—I think, Your Honor, that—

THE COURT: Or does it matter what the New Mexico statute says—

MR. WALSH: Well—

THE COURT:—since it's—anyway, go ahead.

MR. WALSH: Yes, Your Honor. It matters in that we have three felony DUI offenses, and it's going to be a question of law, obviously, as to whether those count under 924(e).

Now. as to the particular statute of 66-8-102, it matters to the extent that it lays out a felony offense for DUI. And those elements, you know, matter with respect to our argument that it fits under the otherwise clause.

I think that in terms of a particular statute as to whether it constitutes an offense in terms of having an element of the use of force, that does not matter, we contend, because again, were arguing that felony

DUI fits because of, again, [19] the otherwise clause, that the conduct involves serious potential risk of injury to another.

So it does not matter, I contend, that the felony DUI statute may not have an element as to use of force, because we're not arguing it fits there. We're arguing because it fits under, again, the otherwise clause of 924(e).

THE COURT: And I think your answer would be the same on this, but I believe the New Mexico Supreme Court has interpreted this felony DWI statute that, under the habitual offender statute in New Mexico—for example, you know, I think if you have three prior felonies, then you're subject to up to an eight-year enhancement.

And the New Mexico Supreme Court has determined that that felony DW—even though it's called felony DWI commonly does not meet up with—it's not a felony for purposes of applying individual offender statutes. So would your response be the same?

MR. WALSH: Yes, Your Honor. You know, again, we're not saying because it has an element regarding the use of force. We're going back and we're relying on our argument that it fits under the otherwise cause.

THE COURT: Okay,

MR. WALSH: Clause, rather. And again, from our view, that's why it fits, because it—felony DUI, the conduct of that offense certainly does pose a risk of physical injury [20] to another, the conduct itself.

So nothing further.

THE COURT: Okay, Ms. Katze, this is—Mr. Walsh, this is an issue that, obvious, you know, whichever

way I rule, I could easily see the Tenth Circuit reviewing. So I think I need to issue a detailed written ruling on this particular issue and then, after I do that, reset the matter to complete the sentencing phase. So on this legal issue, is there anything further you wish to state, Ms. Katze, that hasn't been addressed?

MS. KATZE: No. Your Honor, just to point out as well that, as has already been discussed between the Court and Mr. Walsh, that previously while visiting in our circuit, a decision had been made by a district court on the same issue and that he found as well that it was not a crime of violence.

THE COURT: Okay. What I'll do is I'll take this issue under advisement, issue a written ruling, and then, at that point, reset the matter for sentencing to complete it.

* * * *

[Reporter's Certificate omitted in printing]

Government's Exhibit 1

ELEVENTH JUDICIAL DISTRICT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

[Filed MAR 30, 1998]

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No. CR-98-000079-V

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STATE OF NEW MEXICO,
*Plaintiff,*

vs.

LARRY W. BEGAY,
*Defendant.*

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JUDGMENT AND SENTENCE

THIS MATTER having come before the Court on the 20th day of March, 1998, the Defendant being present with his attorney, Louis E. DePauli, Jr., the State of New Mexico represented by Gerald M. Byers, Assistant District Attorney, and the Defendant having pled guilty to the charge of Driving While Under the Influence of Intoxicating Liquor, a fourth or subsequent offense, a fourth degree felony which was committed on the 29th day of January, 1998, which crime was committed with the use of a motor vehicle, contrary to §66-8-102(G), NMSA 1978, as charged in the Criminal Information, as agreed in the Plea and Disposition Agreement which the Court approved, and the Court having accepted the Defendant's guilty plea, the Defendant is hereby found guilty of a fourth degree felony.

IT IS THEREFORE THE JUDGMENT AND SENTENCE of this Court that the Defendant be sentenced to the Department of Corrections for a period of 18 months, followed by one (1) year of parole, that said sentence be suspended except for one (1) year to be served in the Department of Corrections and that upon his release from prison the Defendant be placed on unsupervised probation for a period of six (6) months in accordance with the terms and conditions of a probation agreement to be entered into between the Defendant and the Probation and Parole Division of the Department of Corrections of the State of New Mexico, such agreement being made a part of the Judgment and Sentence as if fully set but herein.

/s/
GRANT L. FOUTZ
DISTRICT JUDGE

SUBMITTED BY:

/s/
Gerald M. Byers
Assistant District Attorney

/s/
Louis E. DePauli, Jr.
Attorney for Defendant

Government's Exhibit 2

ELEVENTH JUDICIAL DISTRICT
COUNTY OF McKINLEY
STATE OF NEW MEXICO

[Filed JAN 11, 2002]

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No. CR-2001-275-II

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STATE OF NEW MEXICO,
*Plaintiff,*

vs.

LARRY W. BEGAY,
*Defendant.*

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# JUDGMENT AND SENTENCE

THIS MATTER came before the Court on the 17th day of December, 2001, the State of New Mexico was represented by James I. Patterson, Assistant District Attorney, the Defendant was present with his attorney, R. David Pederson, the Defendant having previously pled guilty to the charge of PERSONS DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUG which was committed on the 24th day of November, 2000, contrary to §66-8-102(G), NMSA 1978, as agreed in the Plea and Disposition Agreement which the court approved, the Defendant is hereby found guilty of a fourth degree felony.

The Defendant has previously been convicted of 1) Driving While Under the Influence of Intoxicating Liquor, a second offense in Magistrate Court Cause NO. DR-807/LR, on April 9th, 1997 2) Driving While

Under the Influence of Intoxicating Liquor, a fourth offense in Magistrate Court Cause No. DR-97-112/LR, on April 9th, 1997 3) Driving While Under the Influence of Intoxicating Liquor, a fourth, or subsequent offense in District Court Cause No. CR-98-79-V, on March 20th, 1998, and the Court being fully advised in the premises,

IT IS THEREFORE THE JUDGMENT AND SENTENCE of this Court that for Count 1: Persons Driving Under the Influence of Intoxicating Liquor or Drug, the Defendant is sentenced to the McKinley County Adult Detention Center for three hundred sixty four (364) days, with the last thirty (30) days to be served at the Gallup Police Department DUI Facility. Defendant shall be placed on six (6) months supervised probation upon his release.

* * * *

/s/_____
JOSEPH L. RICH
DISTRICT JUDGE

SUBMITTED BY:

/s/_____
James I. Patterson
Assistant District Attorney

/s/_____
R. David Pederson
Attorney for Defendant

Government's Exhibit 3

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF VALENCIA
STATE OF NEW MEXICO

[Filed JAN 14, 2002]

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No. VA 00 319 CR
DA# VL 00 0609

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STATE OF NEW MEXICO,
*Plaintiff,*

vs.

LARRY BEGAY,
*Defendant.*

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# JUDGMENT, PARTIALLY SUSPENDED SENTENCE AND COMMITMENT

On the 20th day of December, 2001, this case came before the Honorable William A. Sanchez, District Judge, for sentencing, the State appearing by Carlos Elizondo, Assistant District Attorney, the Defendant appearing personally and by his attorney Randy Chavez, and the Defendant having been convicted on December 20, 2001, pursuant to a Plea and Disposition Agreement, accepted and recorded by the Court, of the offense(s) of: **Aggravated Driving While Under the Influence of Intoxicating Liquor or Drugs, 4th or Subsequent and Driving While License Suspended or Revoked** contrary to NMSA 1978, Section §66-8-102-(D) & (G), and §66-5-39 a felony offense and a misdemeanor offense occurring on or about the 7th day of April, 2000.

The Defendant is hereby found and adjudged guilty and convicted of said crime(s).

IT IS THE JUDGMENT AND. SENTENCE of the Court that the Defendant be sentenced as follows:

a. For Count I, to 18 months incarceration with 1 year to he suspended for a total of 6 months incarceration and to pay a $700.00 fine.

b. For count II, to 364 days of incarceration with 334 days to be suspended for a total of 30 days of incarceration and a $300.00 fine

c. That the above sentences are to run consecutively for a total incarceration period of 7 months.

d. That the defendant, upon release, to be placed on supervised probation, for the remainder of time imposed. Sentence imposed in this matter is to run consecutive to any sentence currently being served from any other jurisdiction.

* * * *

THEREFORE, You, Cornell Corrections are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

FURTHERMORE, You, the Sheriff of Valencia County New Mexico are hereby ordered to take the above-named Defendant in custody and deliver him to the custody of Cornell Corrections.

/s/_____
William A. Sanchez
DISTRICT JUDGE

APPROVED:

| | |
|---|---|
| /s/_____ | /s/_____ |
| Carlos Elizondo | Randy Chavez |
| Assistant District Attorney | Attorney for Defendant |

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 1, 2005]

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Criminal No 04-2245 WJ

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UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

LARRY BEGAY,
*Defendant.*

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MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the issue of whether Defendant Larry Begay ("Defendant") should be sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4 as a result of Defendant's three separate convictions for the felony offense under New Mexico law for driving while under the influence of intoxicating liquor ("DUI"), fourth or subsequent offense ("felony DUI").[1] For the reasons set forth in this Memorandum Opinion, the Court finds and concludes that Defendant is an armed career criminal within the meaning of 18 U.S.C. § 924(e) and U. S.S. G. § 4B1..4 and shall be sentenced accordingly.

Procedural and Factual Background

On January 24, 2005, Defendant plead guilty to a single count indictment charging him with felon in

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[1] Felony DUI in New Mexico is defined in the Motor Vehicle Code, NMSA 1978 § 66-8-102(G) (as amended). Upon conviction for a fourth DUI, a defendant is guilty of felony DUI.

possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). The United States Probation Office prepared a Pre-Sentence Report ("PSR") which calculated Defendant's sentencing guideline imprisonment range to be 41-51 months based on an offense level of 15 and a criminal history category of VI. The Defendant did not submit formal written objections to any of the reported facts or the sentencing guideline range set forth in the PSR. The United States of America ("Government"), however, did object to the PSR on the basis that it failed to classify Defendant as an armed career criminal based on his criminal history.

The felon in possession of a firearm arose out of an incident involving the Defendant who, after a night of drinking alcoholic beverages, separately pointed a .22 caliber rifle at two female family members demanding money and then threatening to loll the two women by repeatedly pulling the trigger of the rifle. (PSR, ¶10-11). Fortunately for all concerned, the rifle was not loaded.

Paragraphs 32 through 64 of the PSR detail Defendant's adult criminal history. Since 1983, Defendant has amassed 22 DUI arrests of which 12 resulted in convictions. For purposes of this Memorandum Opinion, the Court will consider only Defendant's 12 DUI convictions since they form the basis of the Government's contention that Defendant should be sentenced as an armed career criminal. It should be noted, however, that in addition to Defendant's DUI criminal history, he has an extensive record of arrests and convictions in the Navajo Nation Tribal Court as well as various state courts in Arizona and New Mexico for offenses such as possession of liquor, public intoxication, reckless driving, just to name a few.

Defendant's 12 DUI convictions form the basis for his three felony DUI convictions arising out of the New Mexico State District Courts in the counties of McKinley and Socorro as reflected in Government exhibits 1, 2 and 3 admitted into evidence at the hearing on May 16, 2005. As previously noted, there is no dispute regarding Defendant's criminal history or his three separate convictions for felony DUI. What is disputed is whether the three felony DUI convictions can be the basis for sentencing Defendant as an armed career criminal.

## LEGAL ANALYSIS

The Government contends that Defendant is an armed career criminal pursuant to 18 U.S.C. §924(e). U.S.S.G. § 4B1.4 implements 18 U.S.C. § 924(e) which mandates a statutory minimum term of incarceration of 15 years for a defendant (i) who is convicted of violating 18 U.S.C. § 922(g) (felon in possession of a firearm) and (ii) who has three previous convictions for a violent felony or a serious drug offense. The instant felony offense to which Defendant admitted is felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and there is no dispute that Defendant has three separate convictions for felony DUI, a fourth degree felony punishable under New Mexico law by incarceration for a term not to exceed 18 months. *See* NMSA 1978 § 66-8-102(G) (as amended).[2] Therefore, the question of whether Defendant is an

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[2] Defendant argues in his Sentencing Memorandum (Doc. 27) that the offense of DUI is not punishable by imprisonment of more than one year While it is true that the maximum term of incarceration for the offense of DUI under New Mexico law is less than one year, NMSA 1978 § 66-8-102(G) clearly states the maximum term of incarceration for conviction of the offense of felony DUI is incarceration up to 18 months.

armed career criminal depends on whether felony DUI under New Mexico law is a crime of violence which is defined as any offense under federal or state, law, punishable by imprisonment for a term exceeding one year, that

1. Has as an element the use, attempted use or threatened use of physical force against a person of another or;
2. Is burglary of a dwelling, arson, or extortion involves use of explosives, ***or otherwise involves conduct that presents a serious potential risk of physical injury to another.***

*See* 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a) (emphasis added).

Felony DUI under New Mexico law does not involve burglary of a dwelling, arson, extortion, the use of explosives or has as an element the use, attempted use or threatened use of physical force against the person of another. *Compare United States v. Rutherford*, 54 F.3d 370, 374 (7th Cir. 1995) (1st degree assault conviction under Alabama law for driving motor vehicle under influence of alcohol and causing bodily injury did not involve use of force prong of crime of violence definition), *cert. denied*, 516 U.S. 924 (Oct. 10, 1995) (No. 95-5811). Thus, in order for felony DUI under New Mexico law to constitute a crime of violence as that term is defined in the relevant statutory and sentencing guidelines provisions, the Court must find that felony DUI involves conduct that presents a serious potential risk of physical injury to another.

Defendant cites the recent United States Supreme Court case of *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004) for the general proposition that DUI is not a crime of

violence. The holding in *Leocal* was based on the specific language of 18 U.S.C. § 16 and in footnote 7 of the Opinion, the Supreme Court explicitly distinguished the sentencing guidelines definition of "crime of violence" as used in Section 4B1.2 from the statutory definition contained in 18 U.S.C. § 16. I agree with the Government that the *Leocal* decision is not controlling precedent on the issue of whether Defendant's convictions for felony DUI constitute crimes of violence under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.2.

The Government refers to cases from the Fifth and Seventh Circuits which are more on point and support the Government's position that DUI offenses meet the definition of "crime of violence" under 18 U.S.C. § 924 and U.S.S.G. § 481.2. In *United States v. D. Santiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000), the Fifth Circuit determined that DUI counts as a "crime of violence" under § 4B1.2. *Santiago-Gonzales* was an immigration case, but the § 4B1.2 definition of "crime of violence" was applied to defendant's three previous convictions in New Mexico for the misdemeanor offense of DUI for which Defendant had been given jail time on each conviction. *Id.* at 262.

In *United States v. Rutherford*, 54 F.3d at 375, the Seventh Circuit held that while the DUI offense at issue was not a crime of violence based on the use of force, the offense met the definition of the "otherwise" clause under § 4B1.2, since it involved a *risk* of injury. The Seventh Circuit emphasized that a court must focus on the conduct involved in the offense, and look for a "substantial risk" that the conduct presented a "serious risk of physical injury" rather than "conjecture" or "speculation" about possible harm. *Id.* The *Rutherford* Court concluded that

"[d]riving under the influence vastly increases the probability that the driver will injure someone in an accident." *Id.* at 376. Additionally, in the case of *United States v. McGill*, 347 F. Supp. 2d 1210, 1213-1214 (M.D.Ala. 2004), an Alabama district court recently ruled that the offense of felony DUI under Alabama law constituted a crime of violence, under § 4B1.2 of the sentencing guidelines.

This Court acknowledges that the Eighth Circuit has held that operating a motor vehicle while intoxicated under Iowa law does not constitute a crime of violence under U.S.S.G. § 4B1.2. *U.S. v. Walker*, 393 F3d. 819 (8th Cir.2005).[3] With all due respect to the Eighth Circuit and its well written opinion in *Walker*, I find the reasoning and holdings in *United States v. D. Sanfiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000), *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995) and *U.S. v. McGill*, 347 F. Supp. 2d 1210 (M.D. Ala. 2004), to constitute more persuasive authority.

Moreover, I believe the Tenth Circuit Decision in *United States v. Farnsworth* provides additional authority in support of the conclusion I reach. *See*, 92 F.3d 1001 (10th Cir. 1996), *cert. denied*, 519 U.S. 1034 (Dec. 9, 1996) (No. 96-6662). While the relevant portions of the Tenth Circuit's Opinion in *Farnsworth* involved the propriety of enhancing the defendant's base offense level under U.S.S.G. § 2K2.1(a)(2), the Tenth Circuit noted that the commentary to §2K2.1 references the definition of "crime of violence" in § 4B1.2 which includes conduct that presents a seri-

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[3] Defendant and the United States Probation Office both cite and rely on another Eighth Circuit decision, *United States v. McCall*, 397 F.3d 1028 (8th Cir. 2005). However, by Order entered April 21, 2005, the Eighth Circuit withdrew its Opinion in *McCall*.

ous potential risk of physical injury to another and cited *Rutherford* on the dangers of drunk drivers:

> We agree with the Seventh Circuit that [t]he dangers of drunk dri ing are well-known and well-documented. Unlike other acts that may present some risk of physical injury, . . . the risk of injury from drunk driving is neither conjectural nor speculative. . . . Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known. This is sufficient to satisfy the "serious risk" standard of the "otherwise" clause [of] § 4B1.2(1)(ii).

*Id.* at 1008 -09.

Conclusion

Defendant's Sentencing Memorandum acknowledges that he is an alcoholic which is readily apparent from his extensive criminal history set forth in paragraphs 32 through 64 of the PSR. What is also readily apparent is that Defendant has done little, if anything, to seek help for his alcoholism or to change the behaviors that have lead to the extensive number of arrests for alcohol related offenses including the three felony DUI convictions arising under New Mexico law. Thus, the Court has no difficulty in reaching the conclusion that Defendant's three felony DUI convictions involve conduct that presents a serious potential risk of physical injury to another. Accordingly, Defendant shall be sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.

IT IS SO ORDERED.

/s/ William P. Johnson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 15, 2005]

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Criminal No. 04-2245 WJ

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UNITED STATES OF AMERICA,
*Plaintiff*,

vs.

LARRY BEGAY,
*Defendant*.

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## DEFENDANT'S MOTION TO RECONSIDER THE COURT'S MEMORANDUM OPINION AND ORDER

Larry Begay, by and through his attorney, Margaret Katze, Assistant Federal Public Defender files the following Motion to Reconsider the Court's Memorandum Opinion and Order.

On July 1, 2005 this Court filed its Memorandum Opinion and Order finding that DUI offenses meet the definition of a "crime of violence" under 18 U.S.C. §924(e) and U.S.S.G. §4B1.2. The Court found that due to Mr. Begay's three prior felony DUI convictions he should be sentenced as an armed career criminal with a minimum term of imprisonment of 15 years.

Mr. Begay urges the Court to reconsider its decision. When this Court makes a finding that conduct "presents a serious potential risk of physical injury to another" it is violating *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court increased the maximum range within which it exercised its discretion based

on facts neither admitted by Mr. Begay nor found by a jury, in violation of the Sixth Amendment right to trial by jury and the Fifth Amendment due process right to proof beyond a reasonable doubt. In determining that conduct "presents a serious potential risk of physical injury to another" the Court is making a finding of fact. A jury did not find that in Mr. Begay's particular case his DUIs involved conduct that presented a serious risk of physical injury to another. Mr. Begay never had an opportunity to litigate this issue at the time that he was charged with the felony DUIs. The Court does not have the authority to assess the risk of physical injury to another. No evidence was presented to show that DUI presents a serious potential risk of physical injury to another. Mr. Begay submits that while DUI may be a serious offense, statistically, there is not a serious potential risk that driving under the influence will cause physical injury to another.

If the Court is looking at Mr. Begay's DUI convictions and making a determination that those convictions presented a serious potential risk of physical injury than this is prohibited adjudicative fact finding. A judge cannot make findings of fact that increase the statutory maximum from 10 years to life. In taking a categorical approach the court must compare the elements of Mr. Begay's prior offense to the elements required by the enhancement law. *See Taylor v. United States*, 110 S.Ct. 2143 (1990). This is a statutory issue not a guidelines issue.

If this Court is looking at the possible world of all DUIs and making a finding that DUIs present a serious potential risk of physical injury to another, than the Court is violating the Separation of Powers and Non-delegation doctrines of Article I of the Con-

stitution. *See also, Mistretta v. United. States*, 109 S.Ct.647 (1989)(upholding delegation of law-making power to Sentencing Commission because it did not affect statutory maximum sentences). "In our system, so far as at least concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions." *U.S. v. Evans*, 333 U.S. 483, 486 (1948). The Court is engaging in a law making function. This function is reserved for Congress. Legislative fact-finding is done by the legislature. Determining whether a particular crime or conduct presents a serious potential risk of physical injury to another is determining a legislative fact.

Congress did not add DUI to the list of specific crimes that satisfied the definition of a violent felony for purposes of 18 U.S.C. §924(e). It is an unconstitutional delegation of law to courts to allow a court to engage in substantive law making. The non-delegation doctrine limits the authority of Congress to delegate lawmaking powers to the other two branches. There is no Supreme Court precedent that Congress may delegate to courts the power to determine maximum statutory sentences.

Whether the Court is making a decision that Mr. Begay's DUIs present a serious potential risk of physical injury to another (violating the jury's fact-finding function) or the Court is ruling that all DUIs present a serious potential risk of physical injury to another (violating the legislature's law-making function), the Court is operating outside its authority, and as such should reconsider its ruling and find that Mr. Begay should not be sentenced as an armed career criminal.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489

Electronically filed
Margaret A. Katze
Attorney for Defendant

[Certificate of Service omitted in printing]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 18, 2005]

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Criminal No 04-2245 WI

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UNITED STATES OF AMERICA,
*Plaintiff*,

vs.

LARRY BEGAY,
*Defendant*.

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## UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER THE COURT'S MEMORANDUM OPINION AND ORDER

COMES NOW the Plaintiff, the United States of America, by and through its attorneys, David C. Iglesias, United States Attorney, and David M. Walsh, Assistant United States Attorney for said district, and does hereby respond to the Defendant's Motion to Reconsider the Court's Memorandum Opinion and Order:

1) The Defendant must be sentenced as an armed career miming for the reasons stated in the government's objections to the PSR and in the Court's Memorandum Opinion and Order filed on July 1, 2005. In his motion to reconsider, the Defendant cites to the case of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). However, *Apprendi* specifically excepted prior convictions from it holding, and the Tenth Circuit has clearly stated that the "government need not charge in an indictment and prove to a jury that a defendant's prior

conviction constitutes a 'violent felony' under § 924(e)." *United States v. Moore*, 401 F.3d 1220, 1226 (10th Cir. 2005).

2) The Defendant also argues that the separation of powers doctrine precludes the Court from determining that Felony DUI fits within the scope of 924(e). The government contends that a Court exercises its proper judicial functions when it rules as a matter of law that a particular conviction falls within the purview of 18 U.S.C. § 924(e). It is clear from a plain reading of the statute that there is no limited litany of offenses that may fall under the "otherwise clause" of the armed career criminal statute. The statute therefore contemplates that courts would interpret the law to determine which offenses fit and which do not. Accordingly, Courts across the nation have engaged in this judicial function, resulting in the development of case law that discuss various convictions within the context of 924(e). Further, cases that have specifically addressed the separation of powers argument in relation to the ACCA statute have rejected it. *See United States v. Neilson*, 141 F.3d 1161 (4th Cir. 1998)(Unpublished Opinion)(internal citations omitted)(Attached as Government Exhibit 1); *United States v. Martinez*, 122 F.3d 421 (7th Cir. 1997)(court did not violate separation of powers when it used a military conviction of housebreaking as a burglary offense under 924(e)).

For the foregoing reasons, the United States respectfully requests that the Court deny the Defendant's Motion to Reconsider the Court's Memorandum Opinion and Order.

Respectfully Submitted,

DAVID C. IGLESIAS
United States Attorney

Electronically filed on 7/18/05
DAVID M. WALSH
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[Certificate of Service omitted in printing]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 19, 2005]

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Criminal No. 04-2245 WJ

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UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

LARRY BEGAY,
*Defendant.*

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ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER

THIS MATTER comes before the Court on Defendant's Motion to Reconsider the Court's Memorandum Opinion and Order (Doc. 31) finding that Defendant is an armed career criminal within the meaning of 18 U.S.C. § 924(e) and USSG § 4B1.4.

In Defendant's Motion to Reconsider, he relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for the proposition the Court's findings in its Memorandum Opinion and Order violated *Apprendi* The Court is of the opinion that Defendant's reliance on *Apprendi* is misplaced. As noted by the United States Court of Appeals for the Tenth Circuit in a recent decision, *Apprendi* specifically excepted prior convictions from its holding:

> We conclude . . . that *Apprendi* and Booker's exception for prior convictions subsumes inquiries into whether a given conviction constitutes a

> "**violent felony**." It is a question of law whether a felony meets the statutory definition of a "**violent felony**," and such a question does not trigger the Sixth Amendment concerns addressed in *Booker*. Furthermore, determining whether a prior conviction was for a "**violent felony**" involves an inquiry intimately related to whether a prior conviction exists, and therefore falls within the prior convictions exception to the *Apprendi* rule. . . We therefore conclude that the Government need not charge in an Indictment and prove to a jury that a Defendant's prior conviction constitutes a "**violent felony**" under 6924(e).

*United States v. Moore*, 401 F3d 1220, 1225-26 (10th Cir. 2005).

Defendant also argues that under the separation of powers doctrine, the Court is precluded from determining that felony 13151 under New Mexico law fits within the scope of 18 U.S.C. 924(e). The Court finds no merit in Defendant's separation of powers argument. Moreover, if interpreting a statutory provision by a Federal Judge violates the doctrine of separation of powers, then virtually every Federal Judge in the United States would be guilty of routinely violating the doctrine of separation of powers.

Defendant's Motion to Reconsider (Doc. 31) is denied.

IT IS SO ORDERED.

/s/ William P. Johnson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

[Filed JUL 20, 2005]

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Criminal No 04-2245 WJ

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UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

LARRY BEGAY,
*Defendant.*

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TRANSCRIPT OF CONTINUED SENTENCING

* * * *

[4] So with that, also state on the record that—and recognize the defendant's continuing objections to the findings that I made that his three prior felony DUI convictions under New Mexico law would trigger the armed career criminal enhancement under 924(e). So I'll recognize that objection, and I think, certainly, it's been preserved by the defendant.

* * * *

THE COURT: Okay. Now, Mr. Walsh, under the guidelines with the 924(e) enhancement, the statutory minimum is 15 years or 180 months. Now, in looking at the offense [5] level, however, I think, under the guidelines, the adjusted offense level would be 31, criminal history category of VI, which would establish a range of 188 to 235 months.

* * * *

THE COURT: All right. I think this is important to [6] note for the record because this was not in the original PSR; that with the armed career criminal, my having determined that the defendant's three previous felony DUI convictions triggers the 924(e): enhancement, then under 4B1.4 of the guideline's and specifically 4B1.4(b) (3) (A), the offense level for this defendant would be offense level 34 because the offense of conviction involved the use and possession of a firearm.

And then you take or subtract three levels for acceptance of responsibility. You then arrive at an offense level 31, criminal history category VI, which under the guidelines establishes a range of 188 to 235 months.

So that's—for the record, that's what I will determine the defendant's offense level, criminal history, and guideline sentencing range to be.

And so Ms. Katze.

MS. KATZE Your Honor, if I could just—I just briefly wanted to address my Motion to Reconsider the Court's Memorandum Opinion and Order, because I think perhaps I didn't express myself well because it appears that both the Court and the government—that I did not make myself clear with respect to the argument regarding *Apprendi*.

I'm not arguing that the Court cannot make a determination that Mr. Begay has those prior aggravated DWI convictions. My argument is not to the charge itself, but to the characteristics of the charge, and the conclusion based on [7] those.

My argument is that, if the Court can make a determination that the three DWIs meet the definition

of a crime of violence—in other words, that these present a serious potential risk of physical injury to another—the Court is either engaging in a factual determination which is the province of the jury when, as under *Apprendi*, the Court's factual determination that either Mr. Begay's specific DWIs involved the that they present the serious potential risk of physical injury to another and there had beep no evidence that his particular DWIs have—that they presented any serious potential risk of physical injury to another.

We do know as a fact that they did not result in physical injury to anybody, but the question is, did they present a serious potential risk of physical injury to another? No evidence has been presented to the Court, and the Court made that determination. So it's either making that determination as a factual determination—which my argument is that is in violation of *Apprendi*, because under *Apprendi* a court cannot make a factual determination that increases the statutory maximum. And in a sense, that's, what the Court has done. This was a ten-year Maximum, and now, the maximum possible sentence is life.

Alternatively, if the Court is not making a determination, a factual determination that Mr. Begay's [8] specific DUI/DWI convictions posed the potential, present a serious potential risk of physical injury to another, then it's My argument that the Court is engaging in lawmaking, a legislative function; that the Court is finding that the world of DWIs meet the definition of crime of violence because they necessarily present a serious potential risk of physical injury to another.

My argument is that, if the Court is engaging in the legislative fact-finding or law—it's lawmaking. And again, I think maybe between it wasn't clear, my

separation of powers argument, but that is that Congress can make a determination that a particular crime presents a serious potential risk of physical injury to another.

The Court, in this decision, has basically made that blanket finding. The Court has said DWIs present a serious potential risk of physical injury to another, and I think the evidence of the legislative fact-finding issue is the fact that there is a short list of crimes that specifically were delineated by Congress; and DWI, which is perhaps the most common conviction that is probably seen throughout the United States courts, was not in that list.

And then so the question is, does it fall in the catchall phrase? And it's my position the catchall, I guess, phrase or portion of the definition, it's our position that that is a legislative determination.

[9] So I just wanted to make clear for the record because it—the Court and the government indicated that I misapplied *Apprendi* in arguing that the Court cannot make a determination whether Mr. Begay has those convictions, and that is not my argument at all. It's not the fact of the conviction, it's the characterization of the conviction.

THE COURT: Mr. Walsh, do you want to say anything on this?

MR. WALSH: Your Honor, our response is basically summarized in our response brief to the defendant's Motion to Reconsider, and above and beyond that, I have nothing to provide the Court.

THE COURT: Well, in the order that I entered yesterday afternoon denying the Motion to Reconsider—and I'm going to read. Again, I'm relying on a Tenth

Circuit case, a recent one, and that is *United States versus Moore*, 401 F.3d 1220, at Pages 1225 to 1226, where the Tenth Circuit stated, "We conclude that *Apprendi* and *Booker's* exception for prior convictions subsumes inquiries into whether a given conviction constitutes a violent felony. It is a question of law whether. a felony meets the statutory definition of a violent felony, and such a question does not trigger the Sixth Amendment concerns addressed in *Booker*.

"Furthermore, determining whether a prior conviction was for a violent felony involves an inquiry intimately related [10] to whether a prior conviction exists and therefore falls within the prior conviction's exception to the *Apprendi* rule. We therefore conclude that the government need not charge in an indictment and prove to a jury that a defendant's prior conviction constitutes a violent felony under 924(e)."

And then certainly, the separation of powers issue is preserved for appeal, but I don't find merit to it because I view my role as interpreting a statutory provision. And if I'm guilty of violating the doctrine of separation of powers by interpreting a statutory provision, then as I noted in the order, every federal judge in the United States is likewise guilty of violating the separation of powers because federal judges are routinely called upon to interpret statutory provisions enacted by Congress.

* * * *

[13] THE COURT: Okay. All right. I've reviewed the Presentence Report's factual findings and have considered the sentencing guideline applications, including the finding I made sustaining the government's objection and overruling the defendant's point, that the defendant meets the armed career criminal

provisions of 18 924(e) and U.S. Sentencing Guideline Section 4B1.4, which were where the guidelines incorporate 18U.S.C. 924(e).

The basis for that finding—and I'll note that there are circuits—at this point, there is a split in authority. The defendant has—his criminal history reflects 22 arrests for DUI, 12 convictions out of state court; that is, three separate convictions under New Mexico law for the offense of felony DUI.

Now, the Eighth, Circuit, applying, I believe it was, Iowa law, basically held that the equivalent of felony DUI under Iowa law would not trigger the armed career criminal enhancement and, particularly, that it's the otherwise clause that states, "or involves conduct that presents a serious [14] potential risk of physical injury to another."

The Seventh and the Fifth Circuits have gone the other way, and so the Tenth Circuit, I guess, is going to get a chance to determine whether, in the Tenth Circuit, felony DUI fits the criteria for the definition of crimes of violence under 18 U.S.C. 924(e).

Under the guidelines, the defendant's offense level is 31, criminal history category is VI, and that would establish a guideline imprisonment range of 188 to 235 months.

* * * *

[16] Therefore, the sentence imposed, the defendant will be committed to the custody of the Bureau of Prisons for a term of 188 months.

* * * *

[Reporter's Certificate omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

[Filed JUL 29, 2007]

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Case Number: 1:04CR02245-001WJ
USM Number: 26839-051
Defense Attorney: Margaret Katze

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UNITED STATES OF AMERICA

v.

LARRY BEGAY

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JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☒ pleaded guilty to count(s) Indictment
☐ pleaded nolo contendere to count(s)
☐ after a plea of not guilty was found guilty on count(s)

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count Number(s) |
|---|---|---|---|
| 18 U.S.C. Sec. 922(g)(1) | Felon in Possession of a Firearm, 18 U.S.C. Sec. 924(a)(2) | 9-25-2004 | |

The defendant is sentenced as specified in pages 2 through 5 of this judgment. The sentence is imposed under the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count.

☐ Count dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

McKinley
County of Residence

7/20/2005
Date of Imposition of Judgment

/s/: William P. Johnson
Signature of Judge

Honorable William P. Johnson,
United States District Judge
Name and Title of Judge

7/29/2005
Date Signed

## IMPRISONMENT

The defendant is committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 188 months.

☒ The court makes these recommendations to the Bureau of Prisons:

The Court recommends a Bureau of Prisons facility experienced with and sensitive to Native American culture.

The Court recommends any additional substance abuse treatment programs available through the Bureau of Prisons. The Court recommends the defendant participate in the Bureau of Prisons 500 hour drug and alcohol treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:

- ☐ at on
- ☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Service Office.

## RETURN

I have executed this judgment by:

Defendant delivered on _____ to _____ at _____ with a Certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the probation officer.

☐ The above drug testing condition is suspended based on the courts determination that the defendant possesses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm or destructive device. (Check, if applicable).

☒ The defendant will submit to DNA collection in compliance with statutory requirements while incarcerated in the Bureau of Prisons, or at the direction of the United States Probation Office. (Check, if applicable).

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable).

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable).

If this judgment imposes a fine or restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall obtain and maintain full time, legitimate employment, or attend a vocational or academic training program through-

out the term of supervised release as directed by the probation officer;

6. the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that

may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## SPECIAL CONDITIONS OF SUPERVISION

The defendant must participate in and successfully complete a substance abuse treatment program which may include drug testing, outpatient counseling, or residential placement. The defendant may be required to pay a portion of the cost of treatment and/or drug testing as determined by the Probation Office.

The defendant must refrain from the use and possession of alcohol and other forms of intoxicants. Be must not frequent places where alcohol is the primary item for sale.

The defendant must participate in and successfully complete a mental health treatment program, which may include outpatient counseling, residential placement, or prescribed medication as approved by the probation officer. The defendant may be required to pay a portion of the cost of this treatment as determined by the Probation Office.

The Defendant shall not operate a motor vehicle without the written approval of his probation officer.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| TOTALS | $ 100 | $0.00 | $0.00 |

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Consistent with a stipulation in the Plea Agreement, the defendant forfeits his rights, title, and interest in a Marlin, model Glenfield .75C, .22 caliber rifle, serial number 2331287.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

PUBLISH

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

[Filed DEC 12, 2006]

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No 05-2253

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

LARRY BEGAY,
*Defendant-Appellant*.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. CR-04-2245 WJ)**

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Margaret A. Katze, Assistant Federal Public Defender, Albuquerque, New Mexico, for Defendant-Appellant.

David N. Williams, Assistant United States Attorney, (David C. Iglesias, United States Attorney, with him on the brief), Albuquerque, New Mexico for Plaintiff-Appellee.

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Before **LUCERO**, **HARTZ**, and **McCONNELL**, Circuit Judges.

**HARTZ**, Circuit Judge.

Larry Begay was sentenced to 188 months' imprisonment after pleading guilty to one count of being a felon in possession of a firearm in violation of 18

U.S.C. § 922(g)(1). The district court determined that each of Mr. Begay's three previous felony convictions for driving while intoxicated was a "violent felony" under the Armed Career. Criminal Act (ACCA), 18 U.S.C. § 924(e). *See United States v. Begay*, 377 F. Supp. 2d 1141 (D.N.M. 2005). On appeal Mr. Begay contends that (1) felony driving while intoxicated is not a violent felony under the ACCA, and (2) the district court violated *United States v. Booker*, 543 U.S. 220 (2005), in concluding that it could not impose a sentence below the Guidelines range if a sentence within that range would be reasonable. We have jurisdiction under 28 U.S.C. § 1291 and hold that (1) felony driving while intoxicated is a violent felony under the ACCA, and (2) a district court may impose a sentence outside the Guidelines range even if a sentence within the range would be reasonable. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

## I. BACKGROUND

According to the presentence report (PSR), in September 2004 Mr. Begay threatened to shoot his sister, Annie Begay, with a rifle if she did not give him money. When she informed him that she did not have any money, he repeatedly pulled the trigger, but the rifle did not fire. The next morning she called the Navajo Department of Law Enforcement while he was asleep. Officers responded and found a .22 caliber rifle under a mattress inside his room.

Mr. Begay pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). According to the PSR, Mr. Begay had 12 previous convictions for driving while intoxicated (DWI). Three of these convictions were felonies under New Mexico law, which makes the fourth and each sub-

sequent DWI conviction a felony. *See* N.M. Stat. Ann. § 66-8-102(G)—(J) (1978) ("Upon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony and . . . shall be sentenced to a term of imprisonment of eighteen months. . . . Upon a fifth conviction . . . an offender . . . shall be sentenced to a term of imprisonment of two years. . . ."). The district court determined that a felony DWI is a "violent felony" under the ACCA. With convictions for three such felonies, Mr. Begay was subject to a mandatory minimum sentence of 15 years' imprisonment under the ACCA, *see* 18 U.S.C. § 924(e)(1), and his offense level under the United States Sentencing Guidelines (USSG) was 34, *see* USSG § 4B1.4(a) ("A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal."); *id.* § 4B1.4(b)(3)(A) (setting offense level for armed career criminal at 34 "if the defendant used or possessed the firearm or ammunition in connection with . . . a crime of violence"). A three-level downward adjustment for acceptance of responsibility, *see id.* § 3E1.1, combined with Mr. Begay's prior convictions, which placed him in criminal-history category VI, resulted in a sentencing range of 188 to 235 months.

At sentencing, Mr. Begay contended that the Guidelines range was higher than necessary to accomplish the goals set forth in the list of sentencing factors in 18 U.S.C. § 3553(a). He requested a sentence of 180 months, the minimum permitted under the ACCA. His counsel noted that Mr. Begay had been plagued by alcoholism "for the better part of his life," and that "he has almost no other conviction other than drinking and—while driving, and also, that his DWI cases do not—have not resulted in physical injury to another." R. Vol. III at 10. He also noted that Mr.

Begay's father and brother had died in a car accident and Mr. Begay "had assumed almost completely the role of caretaker in the family compound. . . . He was responsible for taking care of all the livestock, for hauling wood and water for the family." *Id.* at 11. The district court considered each of the sentencing factors in 18 U.S.C. § 3553(a) and concluded that "in order for me to go below the guidelines, I have to make a finding that, under the sentencing factors, the sentence of 188 months is unreasonable." *Id.* at 15. The court continued:

> Again, taking a look at the guidelines, the way they're formulated and how they apply, how the Sentencing Commission has formulated the calculation of the guidelines if the armed career criminal enhancement applies, I cannot make a finding that 188 months is unreasonable under 18 U.S.C., under the sentencing factors of 18 U.S.C. 3553(a).

*Id.* at 16. The court sentenced Mr. Begay to 188 months' imprisonment and adjourned.

## II. DISCUSSION

### A. Violent Felony

#### 1.

The relevant portion of the ACCA definition of *violent felony* is:

> *any crime punishable by imprisonment for a term exceeding one year*, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, *that*—

> (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added). To determine whether an offense is a "violent felony" under the ACCA, we follow the categorical approach set forth by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005); that is, we look only to the statutory definition of the crime. *See United States v. Moore*, 420 F.3d 1218, 1220 (10th Cir. 2005). Mr. Begay's three felony convictions were for violations of N.M. Stat. Ann. § 66-8-102A, which states: "It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." Mr. Begay contends that this crime is not a "violent felony" under the ACCA. We review questions of statutory interpretation de novo. *See Moore*, 420 F.3d at 1220.

Mr. Begay argues that the "otherwise" clause in § 924(e)(2)(B)(ii) embraces only offenses "that present[ ] a serious potential risk of physical injury to another" in the same way as the specifically enumerated crimes—burglary, arson, extortion, or crimes involving explosives. Because DWI is dissimilar to these enumerated crimes, he concludes, it is not a violent felony under the ACCA.

Mr. Begay cites as authority the Eighth Circuit's opinion in *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005), *overruled by United States v. McCall*, 439

F.3d 967 (8th Cir. 2006) (en banc). The issue in *Walker* was "whether Iowa's offense of Operating While Intoxicated ('OWI') is a 'crime of violence' under the United States Sentencing Guidelines." 393 F.3d at 820. The district court had ruled that Mr. Walker was a career offender under USSG § 4B1.1(a), which provides that a defendant is a career offender if he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." The Guidelines definition of *crime of violence appears* in USSG § 4B 1.2(a):

> The term "crime of violence" means *any offense* under federal or state law, *punishable by imprisonment for a term exceeding one year, that—*
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is *burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

(emphasis added). As *Walker* noted, "The portions of U.S.S.G. § 4B1.2 at issue are identical to the corresponding portions of 18 U.S.C. § 924(e)(2)(B), except that the guideline provision adds the phrase *of a dwelling* after the word *burglary*." *Walker*, 393 F.3d at 823. It then said, "Since the pertinent language is substantially identical, . . . we will construe [the] guideline language at issue to be consistent with the corresponding language in the [ACCA]." *Id.* at 823.

> The court began its analysis of the definition as follows:
>
> The "otherwise" clause of § 4B 1.2[(a)](2) follows an enumeration of specific crimes: burglary of a

> dwelling, arson, extortion, and crimes that involve the use of explosives. Where general words follow specific words in a statutory enumeration, the established interpretative canons of *noscitur a sociis* and *ejusdem generis* provide that the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

*Id.* at 824. This conclusion, the court stated, "is reinforced by the legislative history of the statute from which the guideline was derived," the ACCA. *Id.* After quoting two paragraphs from the relevant Report of the House Committee on the Judiciary, it observed:

> For present purposes, the most important sentence of this lengthy quotation is the last one, which states that the legislation would add "burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person." . . . Thus, the legislative history reinforces the view that the intent of the "otherwise" clause in 18 U.S.C. § 924(e)(2)(B)(ii) was to encompass crimes similar to burglary, arson, extortion, and crimes that involve the use of explosives.

*Id.* at 824-25 (quoting H.R. Rep, No. 99-849, at 3 (1986)).

*Walker* also relied on language in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in which the Supreme Court held that the offense of driving under the influence (DUI) under Florida law was not a "crime of violence" as defined in 18 U.S.C. § 16, and therefore not an "aggravated felony" under § 101(a)(43)(F) of the Immi-

gration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). Section 16 defines *crime of violence* as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The court in *Walker* quoted the following from *Leocal*:

> In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. *Cf. United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.) (observing that the term "violent felony" in 18 U.S.C. § 924(e) . . . "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence"). Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes.

*Leocal*, 543 U.S. at 11. Deeming it particularly important that the Supreme Court had "cited with approval [a] passage from then Chief Judge Breyer's opinion in *Doe* stating that drunk driving should not be consid-

ered as a 'violent felony' under 18 U.S.C. § 924(e)," the court in *Walker* quoted the pertinent passage from the future Justice's opinion holding that possession of a firearm is not a "violent felony" under the ACCA:

> [T]o read the statute . . . to cover firearm possession [ ] would also bring within the statute's scope a host of other crimes that do not seem to belong there. To include possession [of a firearm], one would have to focus upon the risk of direct *future* harm that present conduct poses. But how could one then exclude, say, drunken driving or unlawful transportation of hazardous chemicals or other risk-creating crimes very unlike the burglary, arson, extortion, and explosives use that the statute mentions? There is no reason to believe that Congress meant to enhance sentences based on, say, proof of drunken driving convictions. Rather, we must read the definition in light of the term to be defined, "violent felony," which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.

*Walker*, 393 F.3d at 826 (ellipsis and brackets in *Walker*) (quoting *Doe*, 960 F.2d at 225).

The *Walker* court reasoned: "It is common sense that OWI is not the same kind of offense as the crimes specifically listed in U.S.S.G. § 4B 1.2(a)(2). . . . The latter are hostile, aggressive acts. They create a significant risk of violent confrontation between the criminal and the victim or the law enforcement officer." *Id.* at 825. It concluded, "Since drunken driving—or more precisely, operating while intoxicated—is very unlike the crimes specifically named in § 4B1.2(a)(2), under the rule of *ejusdem generis*, OWI is not encom-

passed by the general language that follows." *Id.* at 826.

Finally, *Walker* stated that its interpretation of the definition of *crime of violence* complied with "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Id.* (internal quotation marks omitted).

> Here, the government construes U.S.S.G. § 4B1.2(a)(2) to encompass all conduct that presents a serious potential risk of physical injury to another. That construction not only ignores the list of specific crimes that precede this general language and therefore modify it, that construction also would render the list of specific crimes redundant or superfluous.

*Id.* at 827. In addition, said the court, the government's interpretation would

> render superfluous the distinction in § 4B1.1(a) and § 4B1.2 between a felony that is a crime of violence and a felony that is a controlled substance offense. . . . On the government's argument, the inclusion of controlled substance offenses as separately named predicate offenses for career offender status would be superfluous because those offenses involve a substantial risk of physical injury to another and therefore would be included in the "otherwise" provision of § 4B1.2(a). Our interpretation of § 4B1.2(a)(2), however, preserves the distinction between subsections (a)(1), (a)(2), and (b); and it avoids a construction that renders any part of § 4B1.2 superfluous.

*Id.* Mr. Begay raises these same arguments in hope that this court will reach the same conclusion.

The government contends that we are bound by our rejection of *Walker* in *Moore*, 420 F.3d at 1221-22. *Moore* held that "felony [driving under the influence] is a crime of violence under USSG § 4B1.2." *Id.* at 1220. "Driving while intoxicated," we stated, "clearly presents a 'serious potential risk of physical injury to another.'" *Id.* at 1221. If we were addressing whether DWI is a "crime of violence" under § 4B1.2 of the Guidelines, the Government would be correct. But on this appeal we are not applying that guideline; rather, we are construing a provision under the ACCA.

At first blush this seems to be a distinction without a difference, because the language we are considering is virtually identical to the language considered in *Moore*. *Moore*, however, relied on more than the plain language of § 4B1.2. It also pointed to, commentary to that Guidelines provision. We observed that "the analysis in *Walker* ignores the more flexible articulation of § 4B1.2's 'crime of violence' definition explained in its commentary section." *Id.* We noted that in that commentary,

> this "or otherwise" language is removed, and the inclusion of offenses with conduct posing a serious potential risk of physical injury is delinked from any preceding specific sequence of offenses. Instead, the commentary gives a long list of crimes of violence ranging from murder to kidnapping to extortion and then, in a separate sentence, explains that "[o]ther offenses are included as 'crimes of violence' if . . . the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented

> a serious potential risk of physical injury to another."

*Id.* at 1221-22 (internal citation omitted). Ordinarily, such "commentary is a binding interpretation of the phrase 'crime of violence'" in the Guidelines. *Stinson v. United States*, 508 U.S. 36, 47 (1993). But, of course, Guidelines commentary is not binding with respect to the ACCA, even if the language in that statute is identical to Guidelines language interpreted in the commentary. Thus, *Moore* is not controlling.

Nevertheless, we believe that *Moore's* construction of § 4B1.2 is also correct for the ACCA. We reach the same conclusion as the en banc decision of the Eighth Circuit in *McCall*, 439 F.3d at 969, which overturned *Walker*, and the decisions of the other circuits to address the language at issue, *see United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005) (felony DWI is a violent felony under the ACCA), *United States v. DeSantiago-Gonzales*, 207 F.3d 261, 264 (5th Cir. 2000) (DUI is a crime of violence under USSG § 4B1.2(a)(2)); *United States v. Veach*, 455 F.3d 628 (6th Cir. 2006) (same);. *United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006) (same).

*McCall* addressed "whether a felony DWI conviction in Missouri is a violent felony under the 'otherwise involves' provision in § 924(e)(2)(B)(ii)." 439 F.3d at 969. The court rejected *Walker's* reliance on *Leocal*, noting that *Leocal*

> held that the plain language of [18 U.S.C.] § 16(b) . . . limits that statute to "violent, active crimes" because the word "used" incorporates a *mens rea* component and thus requires that an offender's conduct be more than "merely accidental or negligent."

> By contrast, as the *Leocal* opinion noted, [543 U.S.] at 10 n.7[1], the "otherwise involves" provision in § 924(e)(2)(B)(ii) is not so limited. It focuses on "conduct that *presents* a serious potential risk of physical injury to another," not on the intent of the offender.

*Id.* at 971.

The *McCall* court also thought that *Walker's* reliance on *noscitur a sociis* and *ejusdem generis* was misplaced, because "[w]hen a statute's plain language is this clear, it is controlling, . . . without the need to refer to [these] canons of construction . . . ." *Id.* Likewise, it said, "contrary hints in the legislative history" could not overcome the clear statutory language, *id.*, and in any event, that history undermines, rather than supports *Walker's* reliance on canons of construction. *McCall* explained:

> [T]he enumerated crimes and the word "otherwise" were *added* to the "involves conduct" lan-

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[1] Footnote 7 in *Leocal* states:

> Thus, § 16(b) plainly does not encompass all offenses which create a "substantial risk" that injury will result from a person's conduct. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Compare § 16(b) (requiring a "substantial risk that physical force against the person or property of another may be used"), with [USSG] § 4B1.2(a)(2) . . . (in the context of a career-offender sentencing enhancement, defining "crime of violence" as meaning, *inter alia*, "conduct that presents a serious potential risk of physical injury to another"). The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may "use" physical force against another in committing the DUI offense.

> guage. The form of the addition made the "otherwise involves" provision look like a catchall when in fact it was initially the operative provision. Adding the enumerated crimes served the obvious purpose of including all prior convictions for those crimes (burglary, arson, extortion, use of explosives), regardless of whether they present a serious potential risk of physical injury. Given this drafting sequence, it is wrong to infer that Congress intended to limit the "otherwise involves" provision to offenses that are similar to the enumerated add-ons.

*Id.* (internal citation. omitted). (This circuit relied on this same legislative history in *United States v. King*, 479 F.2d 801, 803 (10th Cir. 1992), to declare that the crimes covered by the "otherwise" clause were not restricted to property crimes.)

Finally, addressing the First Circuit's opinion in *Doe, McCall* stated: "[T]hough we give due regard to contrary dicta in *Doe* which cautioned against construing the 'otherwise involves' provision to include risk-creating crimes 'that do not seem to belong there,' we conclude that we must construe the provision consistent with its plain language." *Id.* (internal citation omitted). Thus, the court concluded that "a violent felony within the meaning of § 924(e)(2)(B)(ii) includes any crime whose elements involve conduct that necessarily presents a serious potential risk of physical injury to another." *Id.*

**2.**

We agree with the holdings of *McCall* and the Seventh Circuit in *Sperberg*. First, DWI is encompassed by the natural meaning of the statutory language "any crime . . . that . . . involves conduct that

presents a serious potential risk of physical injury to another." DWI certainly presents such a risk. Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers. When the dissent states that its construction of § 924(e) captures "ordinary meaning," it is apparently referring not to the meaning of the above, quoted language but to the term defined by that language—namely, *violent felony*. Surely, however, we should look to the statutory definition of the term and begin with the ordinary meaning of that language rather than with the "ordinary meaning" of the term that Congress thought it advisable to define. Even less should we rely on the short title of the statute, "The Armed Career Criminal Act." The term *armed career criminal* appears nowhere in the United States Code, not even in the heading to any codified provision. It would be rather unusual, and disrespectful to legislative drafting, to let such a title override statutory language. The Racketeer Influenced and Corrupt Organizations chapter of the Criminal Code, 18 U.S.C. §§ 1961 et seq., is not interpreted by restricting its reach to entities that are described by the ordinary meaning of the title; instead, courts refer to the statutory language. We should do likewise here.

**3.**

Second, statutory purpose does not suggest a different definition. Section 924(e) is a punishment provision. It states that particularly severe sentences should be imposed on certain violators of 18 U.S.C. § 922(g) (which prohibits the possession of firearms by various classes of people, including, and typically, convicted felons)—namely, those who have repeatedly committed "violent felonies." But how to define such felonies for this purpose?

It is revealing that Congress could have adopted the same language that appears in the definition of *crime of violence* in the very same statutory section, 18 U.S.C. § 924(c)(3). (This statutory definition of *crime of violence* was added by Pub. L. No 99-308 on May 19, 1986; it is a slight variation of the definition of *crime of violence* in 18 U.S.C. § 16, which was enacted in 1984. The definition of *violent felony* was added by Pub. L. No. 99-570 on October 27, 1986.) The definition of *crime of violence* is:

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). A detailed examination of the differences between the definitions of *crime of violence* and *violent felony* is less important than the observation that there are differences. The reason for the differences must be that the definitions serve distinct purposes. The definition in § 924(c) was used to create a criminal offense. Under § 924(c)(1)(A), "any person who, during and in relation to any crime of violence . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is subject to punishment for a separate offense with a minimum sentence of five years' imprisonment. In other words, when someone while committing a "crime of violence" uses or carries a firearm or possesses a firearm in furtherance of that crime, then that person has violated § 924(c). Undoubtedly, Congress defined

*crime of violence* in this context to capture those crimes in which the danger is magnified by the firearm. It is not surprising that DWI is not a "crime of violence," because a firearm in the car does not increase the danger from the DWI offense. The dissent's view of *violent felony* would seem to conform to the purpose for defining *crime of violence* as it appears in § 924(c).

But the term *violent felony* serves a different purpose. The definition of *violent felony* in § 924(e)(2)(b) is used to identify persons who should be sentenced to very long terms for their present offense (possession of a firearm by a convicted felon) because of their criminal history. One may disagree with the choice, but it seems perfectly reasonable to include within the definition those who have a confirmed history of displaying contempt for human life or safety—those who, in the statutory language, have repeatedly committed felonies "involv[ing] conduct that presents a serious potential risk of physical injury to another." From this perspective, there is nothing remarkable about including felony DWI as a "violent felony."

In that regard, it is significant that the five circuits to address the issue have held that the term *crime of violence* in the Sentencing Guidelines, USSG § 4B1.2(a), which is defined identically to the term *violent felony* in § 924(e) (and, ironically, not identically to the statutory definition of *crime of violence* in § 924(c)) encompasses DWI. To be sure, as already noted above, our construction of § 924(e) is not controlled by our decision in *Moore*, 420 F.3d 1218, interpreting USSG § 4B1.2(a), because *Moore* relied, at least in part, on Sentencing Commission commentary to the definition—commentary which is ordinarily binding in interpreting the Guidelines. Nevertheless, one may well ask why the Sentencing Commission apparently

adopted a definition in this context broad enough to include felony DWI. And the answer must again lie in the context; the Sentencing Commission was considering what type of criminal history indicates that a person is so dangerous that a long term of incarceration is appropriate, regardless of the present offense of conviction. That is essentially the same context for which Congress defined *violent felony*. The Sentencing Commission's expertise on sentencing issues counsels us to defer to its construction of the same language confronting us in this case, even though the formal grounds for deference are inapplicable.

Thus, both the natural meaning of the statutory language and the apparent statutory purpose support a construction of the term *violent felony* to include felony DWI. Neither the legislative history nor canons of construction persuade otherwise. The only legislative history referred to by disputants on this issue is, as usual, of little help, nor do canons of construction assist in distinguishing between the constructions of the statutory language embraced by the parties on this appeal.

The legislative history relied upon by the opposing opinions in the Eighth Circuit's *McCall* case is a statement in a report by the House Committee on the Judiciary:

> [One] major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of "violent" felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, ex-

> tortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H.R. Rep. No. 99-849, at 3 (1986). To begin with, it is worth noting that the committee report does not say that the definition includes *only* the enumerated and similar crimes. The emphasis placed in legislative history on one effect of a statute does not mean that it has no others. For example, when Congress imposed limits on civil-rights suits by prisoners, Members repeatedly noted problems caused by suits challenging prison conditions. Nevertheless, the statutory language compelled us also to apply those limits on other civil-rights claims. *Cf. Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006) (rejecting contention that it would be absurd to apply the provision to civil-rights claim that arose before prisoner was incarcerated).

More importantly, the quoted committee report did not address the final language of the statute, but rather the version before addition to § 924(e)(2) of the language "is burglary, arson, or extortion, involves use of explosives, or otherwise" (what I will call the "specific language"). In other words, it referred only to the language "involves conduct that presents a serious potential risk of physical injury to another" (what I will call the "general language"). One can speculate from this history either (1) that the addition of the specific language was to make clear (in case one disagreed with the committee report's view of the general language) that the term *violent felony* encompassed the newly listed offenses, from which one can infer that the general language is to be read broadly as not being limited to crimes like the newly added offenses (the view of the *McCall* majority) or (2) the

addition of the specific language was to suggest that the general language should be read narrowly to encompass only offenses similar to the newly listed ones (the view of the *McCall* dissent). I think the *McCall* majority view is the more plausible, but it is impossible to know. This ambiguous history is not particularly persuasive either way.

Nor are canons of construction—in particular, *ejusdem generis* and *noscitur a sociis*—helpful in this case. These two canons state that a term in a series should be understood in a limited sense that the term shares with the others in the series. The word to be so limited in the phrase "conduct that presents a serious potential risk of physical injury to another" is the word *conduct*. But how is the meaning of *conduct* to be limited? The statute itself says that the conduct must "present[ ] a serious potential risk of physical injury to another." One could certainly say that this limitation is also a feature, perhaps the essential common feature, of the enumerated crimes: burglary, arson, extortion, and crimes involving the use of explosives. But the dissent would be more restrictive. "Each of the[ ] enumerated crimes," it says, "involves violent, aggressive conduct." Dissent Op. at 5. It is questionable, however, whether opening an unlocked front door to a home for the purpose of committing larceny is "violent" conduct (and if not, should burglary count only if committed in a "violent" manner?); and one could reasonably describe felony DWI as both "violent" and "aggressive." It is important to recognize the rather limited role of the *ejusdem* and *noscitur* canons in the enterprise of statutory construction. The Supreme Court appears to reject their application as often as it embraces them. *See, e.g., Garcia v. United States*, 469 U.S. 70 (1984) (rejecting application of *ejusdem generis* when terms in series are each

separated by "or"). And when it embraces them, one wonders whether they are critical to the Court's reasoning or makeweight additions to an argument based on deeper principles. Whatever the value of these two canons, they cannot be used to make fine distinctions regarding what common features of terms in a series should be imposed on a more general term in the series. I do not see how these canons can inform us that the word *conduct* should be restricted any more than it is by the statute's modifying phrase "that presents a serious potential risk of physical injury to another."

Moreover, there is a particularly compelling reason not to apply these two canons in this case. The statutory language at issue defines *violent felony* as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, or *otherwise* involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B) (emphasis added), Mr. Begay contends that "conduct that presents a serious potential risk of physical injury to another" should be interpreted as restricted to conduct *like* burglary, arson, etc. But the primary definition of *otherwise* is "in a different way or manner." Webster's Third New International Dictionary 1598 (2002). Thus, the otherwise clause is best understood not as saying "conduct that presents (*in the same way* that burglary, arson, etc., do) a serious risk of physical injury to another," but rather "conduct that presents (*in a manner different from* burglary, arson, etc.) a serious risk of physical injury to another." The use of *otherwise* in the statute negates the two canons.

In sum, the ordinary, natural meaning of § 924(e)(2)(B) encompasses DWI. Although other considerations can, and do, override ordinary meaning in some circumstances, I am not persuaded that such circumstances are present here. I therefore would apply ordinary meaning and reject Mr. Begay's argument. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.")

**B. Reasonableness of Sentence**

Mr. Begay contends that the district court violated *Booker* at sentencing when it stated that it could not impose a sentence below the Guidelines range unless a sentence within that range would be unreasonable. Counsel for Mr. Begay had requested a sentence of 180 months and proffered several reasons why such a sentence would fulfill the purposes of sentencing set forth in 18 U.S.C. § 3553(a). After hearing these arguments, the court stated:

> Now, in order at this point and noting the defendant's continuing objection, the low end of the guideline—applicable guideline range is 188 months. The statutory minimum is 180 [months], and so in order for me to go below the guidelines, I have to make a finding that, under the sentencing factors, the sentence of 188 months is unreasonable.
>
> Again, taking a look at the guidelines, the way they're formulated and how they apply, how the Sentencing Commission has formulated the calculation of the guidelines if the armed career

> criminal enhancement applies, I cannot make a finding that 188 months is unreasonable under 18 U.S.C., under the sentencing factors of 18 U.S.C. § 3553(a).
>
> Therefore, the sentence imposed, the defendant will be committed to the custody of the Bureau of Prisons for a term of 188 months.

R. Vol. III at 15-16. The court then addressed the terms of supervised release, imposed a fine, notified Mr. Begay of his right to appeal, and adjourned the hearing.

**1. Merits**

We agree with Mr. Begay that the district court erred. In *Booker*, 543 U.S. 220, the Supreme Court held that mandatory application of the Guidelines violated the Sixth Amendment. To remedy the violation, it made the Guidelines advisory. Appellate review of a sentence would henceforth be for "unreasonableness." *Booker*, 543 U.S. at 261-62. In other words, so long as the district court's sentence is reasonable, we will affirm it. *See United States v. Kristl*, 437 F.3d 1050, 1053-54 (10th Cir. 2006).

Although the. Guidelines "continue to be the 'starting point' for district courts and for this court's reasonableness review on appeal," *United States v. Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006), they impose no rigid boundaries on what sentences are permissible. In any given case there could be a range of reasonable sentences that includes sentences both within and outside the Guidelines range. *Booker* and § 3553(a) do not require the district court to limit itself to those reasonable sentences within the Guidelines range. The court may impose a non-Guidelines sentence if the sentencing factors set forth in § 3553(a) warrant

it, even if a Guidelines sentence might also be reasonable. The district court misconceived *Booker* when it said otherwise.

**2. Relief/Preservation**

Having determined that the district court erred, we must next resolve whether Mr. Begay is entitled to relief. He failed to object in district court to the court's error. Ordinarily, this failure would require that we limit our review to plain error, *see United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (en banc), so that we could set aside Mr. Begay's sentence only if he demonstrates that "there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings," *id.* (internal quotation marks omitted). In this case, we doubt that Mr. Begay could surmount the final requirement. *See id.* at 736-37.

Nevertheless, in certain circumstances we have excused a defendant's failure to object to an error by the district court when imposing sentence. We have relied on the provision in Fed. R. Crim. P. 51(b) that states, "If a party does not have the opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Mr. Begay argues: "The distinct court did not explain until it announced Mr. Begay's sentence that it would not impose a sentence below the guideline range unless it found the guideline range to be unreasonable. Thus, the error was not apparent until it was too late to object." Aplt. Br. at 33.

In support of his position Mr. Begay cites *United States v, Bartsma*, 198 F.3d 1191 (10th Cir. 1999). In *Bartsma* the district court imposed a special condi-

tion of supervised release without giving notice to the defendant. The defendant did not object to the condition, but this court ruled that the issue had not been waived, We stated:

> Mr. Bartsma had no notice the district court was considering the special condition until the court stated its tentative sentence near the beginning of the sentencing hearing. . . . [T]he complete lack of notice made it impossible for the parties to anticipate the nature of the special condition and short-circuited the significance of any opportunity to comment.

*Bartsma*, 198 F.3d at 1198; *accord United States v. Bruce*, No. 05-2150, 2006 WL 2349216, at *8 (10th Cir. Aug. 15, 2006). Although the sentencing error in this case was not imposition of a special condition of supervised release, it was an error that Mr. Begay would have had no reason to anticipate. *Cf. United States v. Barajas*, 331 F.3d 1141, 1144 (10th Cir. 2003) (issue was not preserved when "defense counsel had constructive notice that the challenged conditions of release might be imposed" and failed to object); *United States v. Lopez-Flores*, 444 F.3d 1218, 1220-21 (10th Cir. 2006) (reviewing for plain error the defendant's claim that his sentence was unreasonable because the district court did not justify it under the § 3553(a) factors). Nothing in the record suggests that Mr. Begay should have been prepared for the district court's novel interpretation of *Booker*. Indeed, the government makes no attempt to distinguish *Bartsma*. Accordingly, we will follow *Bartsma* in excusing Mr. Begay's failure to object to the district court's error at the time of pronouncing sentence.

We must reverse and remand for resentencing unless the government can establish that the error was harmless. *See* Fed. R. Crim. P. 52(a). But the government fails to argue harmless error. Nor could it do so successfully. The sentence imposed was at the bottom of the Guidelines range. We cannot say whether the district court would have imposed the same sentence if it had properly understood the post-*Booker* legal landscape. This "places us in the zone of speculation and conjecture." *United States v. Labastida-Segura*, 396 F.3d 1140, 1143 (10th Cir. 2005). Thus, remand is required so that the district court can determine whether it should impose a lower sentence, even though a sentence within the Guidelines range may indeed be reasonable.

## III. CONCLUSION

We AFFIRM the district court's ruling that Mr. Begay is subject to a mandatory minimum sentence under 18 U.S.C. § 924. We REVERSE and REMAND for resentencing in light of our holding that the district court violated *Booker* at sentencing.

**LUCERO**, J., concurring.

Following my careful review of my respected colleagues' separate expressions in this case, as well as the record, the legislative history, and the pertinent cases, I join the opinion of Judge Hartz, save for Part II(A)(3). I do not disagree with much of what Judge McConnell has said, but ultimately conclude that the language of the statute is so clear and unambiguous that it does not allow resort to the legislative history. 18 U.S.C. § 924(e)(2)(B)(ii) unequivocally reaches a myriad of crimes—burglary, arson, extortion, the use of explosives, "*or* [a crime that) *otherwise* involves conduct that presents a serious potential risk of physical injury to another" (emphasis added). In agreeing with Judge Hartz, the Eighth Circuit sitting en Banc, and a panel of the Seventh Circuit, I conclude that a conviction for felony driving while under the influence falls within the ambit of the quoted statutory text.

Judge McConnell is right to highlight the dramatic increase in sentence that results from application of the Armed Career Criminal Act to Larry Begay's case. I agree that driving while under the influence may not have been in the minds of the 1986 amendment's sponsors when they drafted the residual language in § 924(e)(2)(B)(ii). Nevertheless, the wording that Congress chose is clear. If a change is to be made, it is for Congress, not the courts, to make.

**McCONNELL, J**, dissenting in part.

The majority holds that serial drunk driving is a violent felony for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). As a result, it finds that the defendant was properly sentenced to over fifteen years in prison for a crime that otherwise

would entail a Guidelines range of 41-51 months. I respectfully dissent.

The case arose when Mr. Larry Begay, a 44-year-old Navajo, threatened family members with an unloaded rifle and later pled guilty to unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Based on an offense level of 15 and a criminal history category of VI, the ordinary Guidelines range for this offense would be 41-51 Months, which is a very substantial sentence. But that is not the end of the story. Mr. Begay has a long history of drinking and driving, though fortunately he has never injured anyone. Under New Mexico law, the first three convictions for driving while intoxicated (DWI) are misdemeanors, but subsequent DWIs are classified as fourth-degree felonies, punishable by a term of eighteen months or, upon a fifth conviction, of two years. N.M. Stat. Ann. § 66-8-102-(G)-(J). Mr. Begay has been convicted of DWI in New Mexico twelve times, which means that he has committed more than three. felonies. Under the ACCA, any person convicted of unlawful possession of a firearm who has three previous convictions for a "violent felony" is subject to a mandatory minimum sentence of fifteen years and a Guidelines range of 188-235 months. 18 U.S.C. § 922(g); U.S.S.G. § 4B1.4. The district court concluded that serial DWI is a "violent felony," and sentenced Mr. Begay to a term of 188 months in prison.

The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed

> by an adult, that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*;

18 U.S.C. § 924(e)(2)(B) (emphasis added). The majority joins with the two other courts of appeals that have held felony DWI to be a "violent felony" within the meaning of this statute.[2] *See United. States v. McCall*, 439 F.3d 967 (8th Cir. 2006) (en banc): *United States v. Sperberg*, 432 F.3d 706 (7th Cir.

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[2] This Court and four other courts of appeals have held that felony DWI is a crime of violence under the identical language of U.S.S.G. § 4B1.2(a)(2)). *United States v. Moore*, 420 F.3d 1218, 1220 (10th Cir. 2005); *United States v. DeSantiago-Gonzales*, 207 F.3d 261,264 (5th Cir. 2000); *United States v. Veach*, 455 F.3d 628 (6th Cir. 2006); *United States v. McGill*, 450 F.3d 1276, 1280 (11th Cir. 2006); *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995). I agree with the majority that these precedents are distinguishable, because the Sentencing Commission's commentary to § 4B 1.2(a)(2), which is ordinarily "binding on the federal courts," *Stinson v. United States*, 508 U.S. 36, 46. (1993), employs a broader interpretation of § 4B 1.2(a)(2) than is evident from the language of § 924(e). See Maj. Op. 10-11. We owe deference to the Sentencing Commission's commentary notes interpreting the Commission's Guidelines, but do not owe deference to the Commission in interpreting acts of Congress, even when those acts contain wording identical to. a Guideline. In effect, because the Guideline commentary note omits the key word "otherwise," the cases interpreting U.S.S.G. § 4B 1.2(a)(2)) are not interpreting an identically worded provision.

An unpublished decision of this Court, *United States v. Gwartney*, 2006 WL 2640616 (10th Cir. 2006), recently held that "*Moore* clearly binds the panel" in a case under the ACCA. This panel unanimously rejects the view that *Moore* is so Controlling.

2005).[3] It is with the greatest hesitation that I part company with these decisions. But I am convinced that to treat drunk driving convictions, however numerous, as "violent felonies" is unwarranted by the language of the ACCA and is contrary to the intent of Congress.

In interpreting the term "crime of violence" in another portion of the criminal code, a unanimous Supreme Court recently observed that the "ordinary meaning of this term suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). To be sure, that holding does not directly apply to this case, which involves a different statute with slightly different wording (though the Court's reliance on the "ordinary meaning" of the defined term would seem equally applicable here). But in reaching its interpretation in *Leocal*, the Court quoted from an earlier First Circuit decision, written by then Circuit Judge Stephen Breyer, which interpreted the term "violent felony" in our statute, the ACCA, 18 U.S.C. § 924(e), as "call[ing] to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Id.* at 11 (quoting *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992)). The Supreme Court also cited this Court's observation in *United. States v. Lucio-Lucio*, 347 F.3d 1202, 1205-06

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[3] The Seventh Circuit in *Sperberg* relied on its prior precedent in *Rutherford*, which was an interpretation of U.S.S.G. § 4B1.2(a)(2). *See Sperberg*, 432 F.3d at 708 (finding no distinction between an interpretation of USSG § 4B 1.2(a)(2) and of 18 U.S.C. § 924(e)). Since the majority recognizes (correctly) that an interpretation of U.S.S.G. § 4B1.2(a)(2) is not controlling with respect to § 924(e), Maj. Op. 11, *Sperberg* can have no persuasive value here.

(10th Cir. 2003), in connection with yet another subsection of the ACCA, that interpreting the term "crime of violence" to encompass accidental or negligent conduct, such as drunk driving, "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal*, 543 U.S. at 11. These comments and citations strongly suggest that the Supreme Court does not view drunk driving as within the "violent" category of crimes Congress singled out for heightened punishment, under any of these similar but not identical statutes.

Mr. Begay argues that felony drunk driving does not fall within the meaning of the statutory term "violent felony," and that interpretation of the statute to include felony drunk driving is contrary to the purpose of the statute, its legislative history, and several hoary canons of statutory interpretation. The en banc Eighth Circuit and the concurrence in this case resist resort to legislative intent and canons of interpretation on the ground that the language of the statute is "plain." *McCall*, 439 F.3d at 971 ("we must construe the provision consistent with its plain language"); *id.* ("When a statute's plain language is this clear, it is controlling, without regard to contrary hints in the legislative history and without the need to refer to the canons of *noscitur a sociis* and *ejusdem generis*"); Concur. Op. 1 ("the wording that Congress chose is clear"). The opinion for the Court does not appear to agree that the language is "plain," but instead looks to legislative history and other outside indications of congressional meaning.

Unlike the concurrence, I find the language of § 924(e) anything but "plain," and in light of evidence of legislative intent and canons of construction, I be-

lieve the language favors the defendant. The ACCA defines "violent felony" as including any crime punishable by more than one year in prison that either "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The question is whether felony drunk driving qualifies under the second of these definitions.

This definition is susceptible to two linguistically plausible interpretations. The first, favored by the government, has been dubbed the "all crimes" interpretation. *See McCall*, 439 F.3d at 977 n.8 (Lay, J., dissenting), Under this interpretation, a violent felony is any crime, regardless of its nature, that involves conduct presenting a serious potential risk of physical injury to another. The examples that precede the "otherwise involves" clause, under this interpretation, do not limit or narrow the scope of the definition, but rather are listed to make sure that the crimes of burglary, arson, extortion, and crimes using explosives are categorically included.

The second, favored by the defense, has been dubbed the "similar crimes" interpretation. *Id.* at 977 n.9. Under this interpretation, the general phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another" is limited to crimes of a nature similar to the enumerated crimes of burglary; arson, extortion, and crimes using explosives. Each of these enumerated crimes involves violent, aggressive conduct; each is characteristic of the armed career criminal, the eponym of the statute. In the words of the First Circuit in *Doe*, 960 F.2d at

225, quoted with approval by the Supreme Court in *Leocal*, 543 U.S. at 11, these are "crimes that involve the possibility of more closely related, active violence." Moreover, each of the enumerated crimes is potentially more dangerous when firearms are involved, which is evidently the reason Congress imposed so severe a penalty on persons who have committed these crimes who later are found in possession of a firearm. Both sides appear to agree that drunk driving is not of this nature. Although it undoubtedly entails risk of physical injury to others, drunk driving is a crime of negligence or recklessness, rather than violence or aggression; it is not characteristic of career criminals; and its dangers are unrelated to the presence or use of firearms. The question in this case therefore comes down to which interpretation of the statute is correct. If the "all crimes" interpretation is correct, drunk driving is included; if the "similar crimes" interpretation is correct, drunk driving is not included.

Looking first at the language chosen by Congress, I consider the "similar crimes" interpretation more persuasive. The key is Congress's use of the term "otherwise." Under the "all crimes" interpretation adopted by the majority, the word "otherwise" is surplusage. The statute is interpreted as if Congress had defined "violent felony" as any felony that "is burglary, arson, or extortion, involves use of explosives, or . . . involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B) (omitting the word "otherwise"). That is not the statute Congress wrote. By using the word "otherwise," Congress indicated a substantive connection between the enumerated crimes and the general phrase. Rather than covering *all* felonies involving "conduct that presents a serious potential risk of physical

injury to another," Congress limited coverage to felonies that "otherwise" involve such a risk—in other words, felonies that, while not identical to burglary, arson, extortion, or explosives offenses, impose a similar sort of risk.

Other indicia of meaning support this interpretation. The Supreme Court has repeatedly stated that "'[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *U.S. Nat. Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (*quoting United States v. Heirs of Boisdore, 8* How. 113, 122, 12 L.Ed. 1009 (1850)); *see also Dole v. Steelworkers*, 494 U.S. 26, 35 (1990). Given the history and purpose of the ACCA, as well as the context of the "otherwise" clause in the statute, felony driving while intoxicated simply does not fit with the other crimes enumerated and contemplated by § 924(e).

When confronted with another question regarding the interpretation of 18 U.S.C. § 924(e)(2)(B)(ii)—the meaning of "burglary"—the Supreme Court took its bearings from a detailed examination of the history and purposes of the provision. *Taylor v. United States*, 495 U.S. 575, 581-90 (1990). The Court concluded that "Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-88. The Court interpreted the statutory term "burglary" in terms of that general purpose. *See id.* at 590 ("These observations about the purpose and general approach of the enhancement provision enable us to narrow the range of possible meanings of the term

'burglary.'"). Applying the same method here, it seems beyond question that drunk drivers fall outside any reasonable understanding of Congress's definition of an "armed career criminal." Drunk drivers do not drive drunk "as their means of livelihood," and the threat they pose to other persons has nothing to do with whether they possess weapons.[4]

More specific legislative history confirms the "similar crimes" interpretation. The first version of the ACCA sentencing enhancement, enacted by Congress in 1984, applied to any convicted felon found guilty of possession of a firearm who had three previous convictions for robbery or burglary. *Taylor*, 495 U.S. at 581. In 1986, Congress debated two proposals for expanding the reach of the enhancement. The broader proposal would have included any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at 583 (quoting S. 2312, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986)). If enacted, this enhancement would have included crimes, such as vandalism, that involve the use of physical force against

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[4] The opinion for the Court would have us discount Congress's purpose of targeting career criminals, arguing that it would be "disrespectful to legislative drafting[ ] to let such a title override statutory language." Maj. Op. 15. Yet in *Taylor*, in determining the meaning of the statutory term "burglary," the Supreme Court relied heavily on the connection between that term and the congressional object of heavily punishing "armed career criminals." *Taylor* 495 U.S. 587-90. It can hardly be improper for us to use the same interpretative approach here. Moreover, the legislative history, both originally and in the amendments relevant to this case, makes clear that the title—the "Armed Career Criminal Act"—was not merely decorative. *See* H.R. Conf. Rep. 98-1159 (1984).

property even if there was no substantial risk of injury to a person. The narrower proposal would have applied the enhancement to "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* (quoting H.R. 4768, 99th Cong., 2d Sess. (1986)). If enacted, this bill would have excluded burglary and arson, which do not contain as an element the use of force against a person. The bill that ultimately was enacted was a compromise: it extended the definition of "violent felony" to those not involving the use of physical force against a person if there was "serious risk of physical injury to another." *Id.* at 586. The House Committee on the Judiciary explained:

> [One] major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony, The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

*Id.* at 587 (quoting H.R Rep. No 99-849 (1986) (first emphasis in original, second emphasis added)). This legislative history makes clear that Congress intended the expanded definition to cover only "similar crimes"—that is, crimes "similar" to burglary, arson, extortion, and use of explosives. For reasons already explained, that does not include drunk driving.

The *McCall* decision's contrary interpretation of the legislative history is based on the notion that the "otherwise involves" clause of § 924(e)(2)(B) was drafted first, and that the enumerated crimes were "add-ons":

> [T]he enumerated crimes and the word "otherwise" were *added* to the "involves conduct" language. The form of the addition made the "otherwise involves" provision look like a catchall when in fact it was initially the operative provision. Adding the enumerated crimes served the obvious purpose of including all prior convictions for those crimes (burglary, arson, extortion, use of explosives), regardless of whether they present a serious potential risk of physical injury. Given this drafting sequence, it is wrong to infer that Congress intended to limit the "otherwise involves" provision to offenses that are similar to the enumerated add-ons.

*McCall*, 439 F.3d at 971 (internal citations omitted). With all respect, I think this is a misleading interpretation. To be sure, the version of the amendment immediately prior to the addition of the "otherwise involves" language did not enumerate the crimes of burglary, arson, extortion, and use of explosives, but this has to be viewed in a broader context. Congress was amending the 1984 version of the statute, which applied explicitly to robbery and burglary, and only to those crimes. These were not "enumerated add-ons," as the *McCall* opinion calls them, but were the statutory foundation on which the congressional deliberations were based. The entire thrust of the 1986 debates was to expand the statute to encompass other crimes that warranted the same treatment already given to robbery and burglary. The only question was how far to go. In answering that question,

we need not "infer" that Congress intended to limit the provision to "offenses that are similar to the enumerated [crimes]," as the *McCall* opinion states. *Id.* The House Judiciary Committee report explicitly tells us: "This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person." *Taylor*, 495 U.S. at 587 (quoting H.R.Rep. No. 99-849 (1986) (emphasis added).

Moreover, the statutory language adopted by Congress contradicts the *McCall* opinion's interpretation. According to *McCall*, "[a]dding the enumerated crimes served the obvious- purpose of including all prior convictions for those crimes (burglary, arson, extortion, use of explosives), regardless of whether they present a serious potential risk of physical injury." *McCall*, 439 F.3d at 971. But this interpretation is belied by Congress's use of the word "otherwise." Whatever else it may mean, the term "otherwise" unmistakably indicates that Congress believed the enumerated crimes *do* present a substantial potential risk of physical injury to others (presumably because burglary, arson, extortion, and explosives crimes frequently, even if not invariably, erupt into violence). It makes no sense to refer to crimes that "otherwise involve" such a risk if the previously listed crimes do not do so. The listed crimes were not "enumerated add-ons"; they were illustrative or even paradigmatic.

The opinion for the Court apparently favors the *McCall* opinion's analysis of the legislative history, but ultimately places little or no weight on it See Maj. Op. 20 ("I think the *McCall* majority view is the more plausible, but it is impossible to know. This ambiguous history is not particularly persuasive either

way."). The opinion for the Court instead emphasizes what it considers to be the "ordinary meaning" of the defined term, Maj. Op. 14, reenforced by an analysis of the statutory purpose. I have already explained why I consider the "similar crimes" interpretation the more plausible rendition of the statutory language. The Court's analysis of statutory purpose warrants additional response.

The opinion for the Court notes that Congress used two different, though similar, terms—"crime of violence" and "violent felony"—in the same statutory section. *Compare* 18 U.S.C. § 924(c)(3) ("crime of violence") *with* § 924(e)(2)(B) ("violent felony"). The term "crime of violence" is defined in such a way that drunk driving is excluded. The opinion for the Court invites us to infer that the more ambiguous language of § 924(e)(2)(B) must lead to the opposite conclusion. The problem with this argument is that the definitions of the two terms vary in a number of different ways. In some respects, § 924(c)(3) is the broader provision, and in some respects it is the narrower. Section 924(c)(3) is broader, for example, in that it includes all crimes with a substantial risk of physical force against *property*, not just against persons; it is narrower in that it is confined to crimes involving the risk of the use of "force." No doubt an intensive analysis could reveal the unifying rationale for all these differences, but it is not immediately apparent.

The opinion for the Court, however, offers a theory. According to that theory, the important distinction is that § 924(c)(3) defines a separate offense, while § 924(e)(2)(B) imposes an enhanced sentence for the present offense on those who have committed violent felonies in the past. Maj. Op. 17. That is true. But the fact that one provision creates a separate offense

while the other imposes a higher sentence for the present offense does not cast much light on the question in this case, because it does not provide any general rationale for the differences between the provisions. If § 924(c)(1)(A) were narrower in all, or even most, respects, one might surmise that Congress was more circumspect in creating a new crime than in imposing an enhanced penalty; but that explanation does not meet these facts.

Nor is the Court's more specific analysis of the statutory purpose of the two provisions more helpful. According to the Court:

> The definition in § 924(c) was used to create a criminal offense. Under § 924(c)(1)(A), "any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is subject to punishment for a separate offense with a minimum sentence of five years' imprisonment. In other words, when someone while committing a "crime of violence" uses or carries a firearm or possesses a firearm in furtherance of that crime, then that person has violated § 924(c). Undoubtedly, Congress defined *crime of violence* in this context to capture those crimes in which the danger is magnified by the firearm. It is not surprising that DWI is not a "crime of violence," because a firearm in the car does not increase the danger from the DWI offense.

*Id.* at 16-17. On the other hand, according to the opinion for the Court:

> The definition in § 924(e)(2)(b) is to identify persons who should be sentenced to very long terms

> for their present offense (possession of a firearm by a convicted felon) because of their criminal history. One may disagree with the choice, but it seems perfectly reasonable to include within the definition those who have a confirmed history of displaying contempt for human life or safety—those who, in the statutory language, have repeatedly committed felonies "involv[ing] conduct that presents a serious potential risk of physical injury to another." From this perspective, there is nothing remarkable about including felony DWI as a "violent felony."

*Id.* at 17. The opinion for the Court thus concludes that a "crime of violence" under § 924(c)(l)(A) is limited to "those crimes in which the danger is magnified by the firearm," which does not include DWI, while "violent felony" under § 924(e)(2)(B) extends more broadly to "those who have a confirmed history of displaying contempt for human life or safety," which does include DWI.

Neither half of this analysis is persuasive. While the Court's interpretation of § 924(c)(1)(A) as focusing on "crimes in which the danger is magnified by the firearm" is eminently sensible, there is no reason not to apply the same logic to § 924(e)(2)(B). That section, after all, imposes its enhanced penalty only on those whose present offense involves the unlawful possession of a firearm. The Court's surmise that "it seems perfectly reasonable to include within the definition [under § 924(e)(2)(B)] those who have a confirmed history of displaying contempt for human life or safety" substantially broadens the target of the statute, beyond anything in the language or legislative history of the statute. If that were the congressional purpose, why limit the enhanced penalty to those who commit firearms offenses?

The "similar crimes" interpretation is further supported by at least two established canons of statutory construction. The doctrine of *noscitur a sociis*, meaning "a word is known by the company it keeps," is often applied to a general term that "is capable of multiple meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Similarly, under the doctrine of *ejusdem generis*, "[w]here general words fallow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (internal quotation marks omitted). Both canons confirm the "similar crimes" interpretation. The opinion for the Court reminds us that the Supreme Court "appears to reject [the canons'] application as often as it embraces them." Maj. Op. 20. Even the case cited by the Court, however, acknowledges that use of *ejusdern generis* is "firmly established" when a statute's meaning is uncertain. *Garcia v. United States*, 469 U.S. 70, 74 (1984) (quoting *United States v. Powell*, 423 U.S. 87, 91 (1975)). Under these rules of construction, the ACCA's "otherwise" clause should be restricted to violent, active crimes which, like burglary, arson, extortion, and crimes involving explosives, are typical of career criminals, and which are more dangerous when committed in conjunction with firearms.

The opinion for the Court also rejects the canons on the ground that it is not obvious that all burglaries—for example "opening an unlocked front door to a home for the purpose of committing larceny"—are "violent." Maj. Op. 21. But this is just to quibble with Congress's judgment that, in the typical case, burglary is a

crime that is likely to explode into violence risking substantial injury to the householder. It is well established that whether a crime is a violent felony must be determined on a categorical basis, not on the specific facts of the case. *Taylor*, 495 U.S. at 600-01. I do not argue that Mr. Begay's DWI offenses are not "violent felonies" because he did not hurt anyone (though he did not), but because, on a categorical basis, the crime of DWI does not have the typical attributes of a violent felony, as defined in the statute.

Finally, it bears mention that the rule of lenity may apply. This Court has stated that "we will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *United States v. Diaz*, 989 F.2d 391, 393 (10th Cir. 1993) (internal citations omitted). *See, e.g., United States v. Giles*, 213 F.3d 1247 (10th Cir. 2000) (using lenity to hold that "patches" are not "goods" under the law governing trafficking in counterfeit labels); *United States v. Bazile*, 209 F.3d 1205 (10th Cir. 2000) (using lenity to overturn a mandatory life sentence under U.S.S.G. § 2K2.4(a)); *United States v. Wicklund*, 114 F.3d 151 (10th Cir. 1997) (invoking lenity to overturn the district court's contrary interpretation of a murder-for-hire statute). To be sure, "a court must first consult 'all available relevant materials,' and invoke the rule of lenity only as a tie-breaker when ordinary means of discerning statutory meaning leave the issue in 'equipoise.'" *United States v. DeGasso*, 369 F.3d 1139, 1149 (10th Ch. 2004) (quoting *United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993); *United States v. Ruiz-Gea*, 340 F.3d 1181, 1188 (10th Cir. 2003)). I am inclined to think the rule of lenity is not

needed in this case because the defendant should prevail under other approaches to statutory interpretation. But the opinion for the Court declines to find the language of § 924(e) "plain"; it finds the legislative history "not particularly persuasive either way" (Maj. Op. 20); it concludes that the canons of statutory interpretation are of little help (*id.* at 21); and it offers only speculation regarding congressional purpose (*id.* at 15-17). In such a case, the rule of lenity should tip the scales.

The "similar crimes" interpretation thus finds support in an impressive array of interpretive methods: ordinary meaning, avoidance of surplusage, consistency with general statutory purposes, specific legislative history, and two canons of construction, plus the rule of lenity. I therefore conclude that 18 U.S.C. § 924(e)(2)(B)(ii) should be given the "similar crimes" interpretation, and that under that interpretation, felony DWI is not a "violent felony." I respectfully dissent from Part IIA of the opinion for the Court. I join Part IIB.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed February 21, 2007]

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No. 05-2253

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

LARRY BEGAY,
*Defendant-Appellant.*

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ORDER

Before LUCERO, HARTZ, and McCONNELL, *Circuit Judges.*

Appellant's petition for rehearing is denied. Judge McConnell dissents from the denial.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH SHUMAKER, Clerk

by: /s/ [illegible]
Deputy Clerk